TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 92.

THE POSTAL TELEGRAPH-CABLE COMPANY, PLAINTIFF IN ERROR,

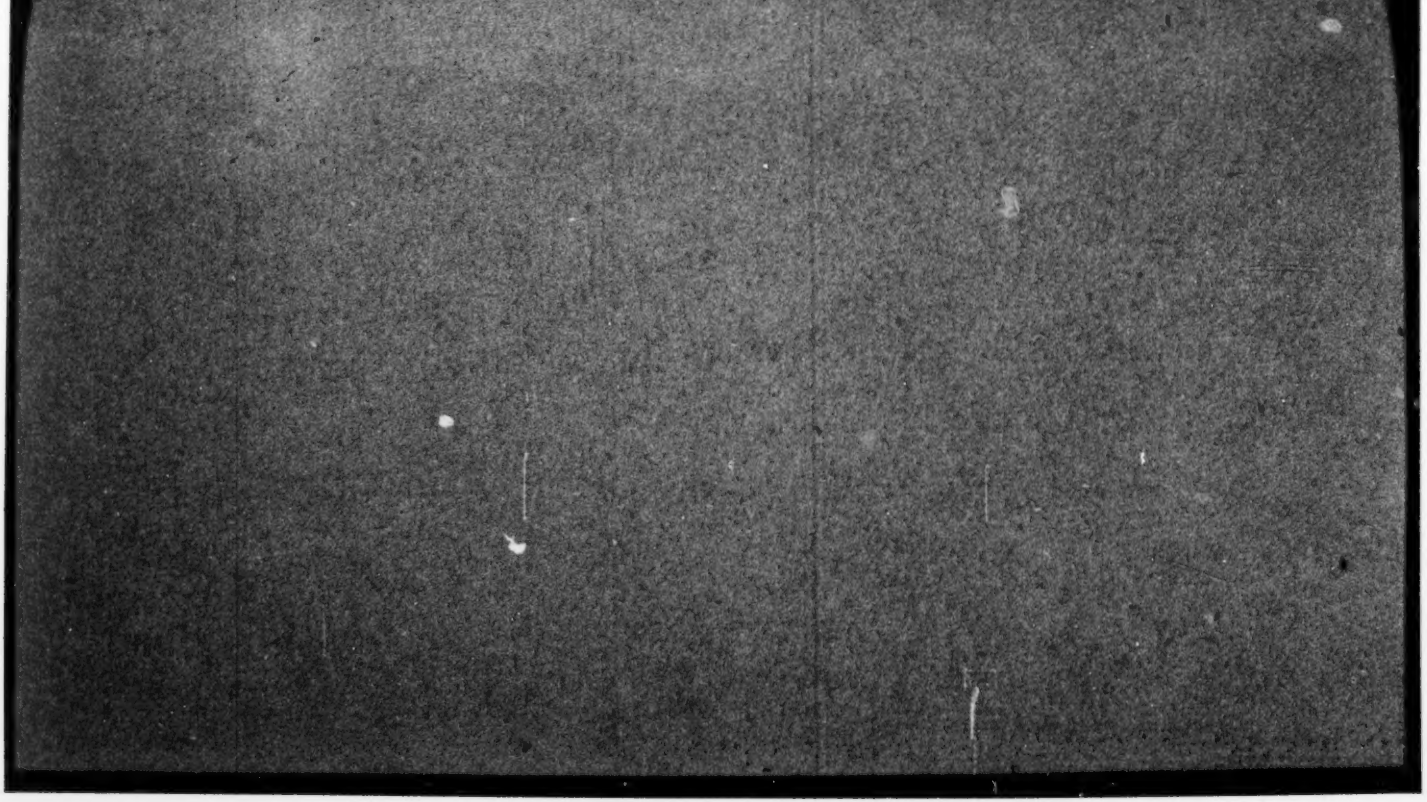
vs.

THE BOROUGH OF NEW HOPE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

FILED JULY 28, 1903.

(18,614.)



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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 1, 1903.

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1 *Petition for Allowance of Writ of Error.*

In the Supreme Court of Pennsylvania, Eastern District, January Term, 1901.

BOROUGH OF NEW HOPE
against
POSTAL TELEGRAPH-CABLE COMPANY, Appellant. } No. 190.

To the Honorable J. Brewster McCollum, chief justice of the supreme court of Pennsylvania:

The petition of the Postal Telegraph-Cable Company, respectfully showeth:—

That a suit was brought against it into the supreme court of Pennsylvania for the eastern district, of January term, 1901 No. 190, by writ of certiorari, from the judgment of the superior court of Pennsylvania, of October term, 1900, No. 128, affirming the judgment of the court of common pleas of Bucks county, of January term, 1899, No. 10, in which suit in said supreme court and said superior court your petitioner was appellant, and the defendant in the
2 said court of common pleas; and The Borough of New Hope was appellee in said supreme court and said superior court and plaintiff in said court of common pleas.

That the said suit in said court of common pleas was an action of assumpsit, brought to recover what is called license fees and charges for four years, beginning October 1st, 1895, October 1st, 1896, October 1st, 1897, and October 1st, 1898, respectively; amounting to one dollar ($1) per year for each telegraph pole, and two dollars and fifty cents ($2.50) per mile of wire upon said poles of your petitioner maintained and used by it in the said borough of New Hope.

Your petitioner, in answer to said suit, claimed that it was not liable as charged, because it was a corporation of the State of New York and had paid all taxes due by it to the Commonwealth of Pennsylvania upon the value of its poles and wires erected and maintained in said borough and elsewhere in said State; that it had accepted the act of Congress, approved July 24th, 1866, and the amendments and supplements thereto; that the poles and wires in question were principally employed and operated in the transmission of messages between the different States, and are therefore instruments of commerce among the several States; that the poles and wires were constructed and have been at all times used in the transmission of telegraphic messages of the United States Gov-
3 ernment; that the highways upon which said poles and wires are constructed and operated are post roads and post routes; that the said poles and wires are part of the interstate telegraph system of the petitioner, running into and through nearly every State in the United States, and connecting with submarine cables to Europe and other foreign countries; that your petitioner

never has maintained any office in the said borough of New Hope, and the said telegraph line, consisting of said poles and wires, merely runs through it, and no telegraph business of any kind is done or transacted by it in said borough, except the maintenance of the said line and transmission of the telegraph messages over the same.

That the said court of common pleas of Bucks county rendered judgment against your petitioner, on October 17th, 1899, in the sum of four hundred sixty-six dollars and forty cents ($466.40), with costs. That on February 14th, 1901, the superior court of Pennsylvania, sitting at Philadelphia, ordered said judgment to be affirmed and afterwards, on the 14th of February, 1901, the said judgment was duly entered and recorded in the eastern district of Pennsylvania aforesaid. That on May 19th, 1902, the supreme court of Pennsylvania, sitting at Philadelphia, ordered said judgment of the superior court to be affirmed, and afterwards, on the nineteenth day of May, 1902, said judgment was duly entered and recorded in
4 the eastern district of Pennsylvania aforesaid. That the said judgment of the said supreme court is a judgment of the highest court of record of the Commonwealth of Pennsylvania. That the judgment of the said court is final.

That the right, title, privilege and immunity claimed by your petitioner, defendant and appellant aforesaid, was claimed under the Constitution of the United States, article one, section eight, clause three, providing, amongst other things, that Congress shall have the power to regulate commerce with foreign nations and among the several States and with the Indian tribes. Also, under the constitution of the State of Pennsylvania, article sixteen, section twelve, providing that corporations organized for the purpose shall have the right to construct lines of telegraph within the State of Pennsylvania, and directing the General Assembly to provide reasonable regulations to give full effect to said section. Also, that pursuant to this mandate the legislature of Pennsylvania, by act of April 29th, 1874, section # 33, P. L. 92, provided that telegraph companies should have the right to construct lines of telegraph along and upon any of the public roads, streets, lanes or highways of the State.

5 That the decision and judgment of the supreme court of Pennsylvania aforesaid, was against the right, title, privilege and immunity so claimed as aforesaid. Your petitioner therefore prays for the allowance of a writ of error to the Supreme Court of the United States, in order that the said judgment of the supreme court of Pennsylvania may be re-examined and reversed or affirmed in the Supreme Court of the United States;

And it will ever pray.

POSTAL TELEGRAPH-CABLE COMPANY,
By WM. H. BAKER, *Vice Pres't.*

STATE OF NEW YORK, }
County of New York, } ss:

Wm. H. Baker, being duly sworn according to law, deposes and says that he is the vice-president of The Postal Telegraph-Cable Company, the petitioner above named, and on behalf of the said company says that the facts set forth in the foregoing petition are true to the best of his knowledge and belief.

WM. H. BAKER.

Sworn and subscribed to before me this 26th day of May, A. D. 1902.

[SEAL.] THEODORE L. CUYLER, JR.,
6 *Notary Public* Notary Public, *Kings County.*

Certificate filed in N. Y. Co.

STATE OF NEW YORK, }
County of New York, } ss:

I, Thomas L. Hamilton, clerk of the county of New York, and also clerk of the supreme court for the said county, the same being a court of record do hereby certify that Theodore L. Cuyler, Jr. has filed in the clerk's office of the county of New York, a certified copy of his appointment and qualification as notary public for the county of Kings with his autograph signature, and was at the time of taking the annexed deposition, duly authorized to take the same, and that I am well acquainted with the handwriting of said notary public, and believe that the signature to the annexed certificate is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court and county, the 26th day of May, 1902.

[SEAL.] THOS. L. HAMILTON, *Clerk.*

Endorsement: Supreme court of Pennsylvania, eastern district. Borough of New Hope *v.* Postal Tel.-Cable Co. Appeal of the Postal Telegraph-Cable Company from the judgment and decree in
7 the case in which The Borough of New Hope was pl't'ff and the above named appellant, def't.

And now, to wit, June 6" 1902, citation awarded and writ of error allowed by me.

J. BREWSTER McCOLLUM,
Chief Justice of Pa.

8 *Writ of Error.*

UNITED STATES OF AMERICA:

The President of the United States to the honorable the supreme court of the State of Pennsylvania for the eastern district, Greeting:

Because, in the records and proceedings as also in the rendition of the judgment of a plea, which is in the said supreme court of Pennsyl-

vania, for the eastern district, before you, or some of you, being the highest court of law and equity of the said State in which a decision could be had, which plea was the appeal of the Postal Telegraph-Cable Company, of January term, 1901, No. 190, to the Supreme Court, by writ of certiorari, from the judgment of the superior court of Pennsylvania, of October term, 1900, No. 128, affirming the judgment of the court of common pleas of Bucks county, of January term, 1899, No. 10, in a certain suit between The Borough of New Hope, plaintiff, against The Postal Telegraph-Cable Company, defendant, wherein was drawn in question the validity of the Constitution and statute law of the United States, and a defense claimed and exercised thereunder, and the decision was against their validity, a manifest error hath happened, to the great damage of the said Postal Telegraph-Cable Company, as by their complaint appears.

9 & 10 We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that then, under your seal, distinctly and openly you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 2nd Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 28th day of June, in the year of our Lord one thousand nine hundred and two, and the one hundred and twenty-sixth year of the Independence of the United States.

[Seal U. S. Circuit Court, E. D. Pennsylvania.]

GEORGE BRODBECK, JR.,
Pro Clerk United States Circuit Court,
Eastern District of Penna.

11 In the Supreme Court of Pennsylvania, Eastern District, January Term, 1901.

BOROUGH OF NEW HOPE
against
POSTAL TELEGRAPH-CABLE COMPANY, Appellant. } No. 190.

Citation.

The United States of America to the Borough of New Hope, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October, next, pursuant to a writ of error

filed in the prothonotary's office of the supreme court of Pennsylvania for the eastern district, wherein The Postal Telegraph-Cable Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

12 Witness the Honorable J. Brewster McCollum, chief justice of the supreme court of Pennsylvania, this 6th day of June, in the year of our Lord one thousand nine hundred and two (1902).

J. BREWSTER McCOLLUM,
Chief Justice of Penna.

Service of the above citation is hereby accepted for The Borough of New Hope, the defendant in error.

WM. C. RYAN,
Attorney for Borough of New Hope.

July 7th, 1902.

13 [Endorsed:] Supreme court of Penna., eastern district. Borough of New Hope *v.* Postal Telegraph-Cable Company, appellant Citation Frank R. Shattuck, attorney at law, Betz building, Philadelphia.

14 *Bond Sur Writ of Error to the Supreme Court of the United States.*

Know all men by these presents: That we, the Postal Telegraph-Cable Company, as principal, and the Union Surety & Guaranty Co. as surety, are held and firmly bound unto the Borough of New Hope in the full and just sum of twelve hundred dollars, to be paid to the said Borough of New Hope, its certain attorney successors or assigns, to which payment well and truly to be made we do bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the 27th day of May, in the year of our Lord one thousand nine hundred and two (1902).

Whereas lately at a court of common pleas of Bucks county, judgment was entered against the Postal Telegraph-Cable Company, at the suit of the Borough of New Hope, of January term 1899, No. 10, which judgment was afterwards affirmed by the supreme court of the State of Pennsylvania, in a certain plea and suit in said court, January term, 1901, No. 190, and the said Postal Telegraph-Cable Company having obtained a writ of error to the Supreme Court of the United States to reverse the said judgment in the last above entitled action, and having filed a copy thereof in the office of the prothonotary of said court, and a citation directed to the said Borough of New Hope, citing and admonishing it to be and ap-

15 pear at a Supreme Court of the United States, to be holden at Washington the second Monday of October, next.

Now the condition of the above obligation is such, that if the said Postal Telegraph-Cable Company shall prosecute its said writ of error to effect and answer all damages and costs, if they shall fail to make their plea good, then the above obligation to be void, else to be and remain in full force and virtue.

THE POSTAL TELEGRAPH-CABLE COMPANY,
By W. H. BAKER, *Vice-President.*

Attest:
[SEAL.] CHAS. P. BRUCH, *Ass't Secretary.*

THE UNION SURETY & GUARANTY CO.
HERMAN SCHUYLER,
Acting Vice-President.

Attest:
[SEAL.] JOHN H. MYERS, *Secretary.*

Approved by
J. BREWSTER McCOLLUM,
Chief Justice of Pennsylvania.

Endorsement: Supreme court of Penna. eastern dist. Borough of New Hope *v.* Postal Tel.-Cable Co. appellant. Bond sur writ of error to the Supreme Court of the United States.

16 Supreme Court of Pennsylvania, Eastern District.

Among the records and proceedings of the supreme court of Pennsylvania, in and for the eastern district, *inter alia*, the following is thus contained:

APPEARANCE DOCKET.

Docket Entries.

January Term, 1901. No. 190.

BOROUGH OF NEW HOPE, Plaintiff,
v.
POSTAL TELEGRAPH CABLE COMPANY, Defendant. } 190.

Frank R. Shattuck.

Appeal of defendant C. P. 10 January term 1899 superior court 128 October term 1900 from the judgment.

Appeal from the *superior court* filed May 20, 1901.

Eo die.—Certiorari exit and directed to the court of *common pleas* of the county of *Bucks* ret'ble forthwith.

17 April 22, 1901.—Petition for an allowance of an appeal from the superior court to the supreme court filed.

May 1, 1901.—Appeal allowed. *Per curiam.*

May 22, 1901.—Record returned and filed.

February 24, 1902.—Assignments of error filed.
February 24, 1902.—Argued.
May 19, 1902.—Judgment affirmed *per curiam*
June 6, 1902.—Petition for writ of error from the Supreme Court of the United States brought into office.

"And now June 6, 1902 citation awarded and writ of error allowed by me

J. BREWSTER McCOLLUM,
Chief Justice of Pennsylvania.

June 6, 1902.—Bond in sum of twelve hundred dollars brought into office and filed.
June 28, 1902.—Writ of error from the Supreme Court of the United States brought into office.
July 7, 1902.—Citation with acceptance of service brought into office.
Eo die.—Assignments of error *in re* writ of error brought into office.

18 *Appeal and Affidavit.*

In the Supreme Court of Pennsylvania for the Eastern District.

BOROUGH OF NEW HOPE, Plaintiff,
v.
POSTAL TELEGRAPH CABLE COMPANY, Defendant.
} No. 128. Superior Court of Pennsylvania, October Term, 1900.

Enter appeal on behalf of Postal Telegraph Cable Company from the judgment of the superior court of Pennsylvania.

F. R. SHATTUCK,
Att'y for Appellant.

To Charles S. Greene, prothonotary supreme court, eastern district.

STATE OF NEW YORK,
County of New York, } *ss:*

William H. Baker, vice president of the Postal Telegraph Cable Co., being duly sworn saith that said appeal is not taken for the purpose of delay, but because appellant believes it has suffered injustice by the judgment from which it appeals.

WILLIAM H. BAKER.

19 Sworn to and subscribed this 14th day of May, A. D. 1901.
[SEAL.] THEODORE L. CUYLER, JR.,
Notary Public, Kings County.

Certificate filed in N. Y. Co.

Endorsement: No. 190 January term, 1901. Supreme court of Pennsylvania, eastern district. Borough of New Hope *v.* Postal Telegraph Cable Company, appellant. Appeal and affidavit. Filed May 20, 1901 In supreme court. Frank R. Shattuck, attorney for appellant.

Præcipe for Certiorari.

In the Supreme Court of Pennsylvania for the Eastern District.

POSTAL TELEGRAPH CABLE COMPANY, Appellant. No. 10, January Term, 1899.

Certiorari to the court of common pleas of the county of Bucks.

Issue certiorari to the court of common pleas of the county of Bucks to bring up record and proceedings in a certain action in said court No. 10 January term 1899 and in the superior court of
20 Penna. No. 128 October term 1900, wherein Borough of New Hope was plaintiff and the said appellant was defendant returnable to next term, *sec. reg.*

——— ———,
Attorney for Appellant.

To Charles S. Greene, prothonotary supreme court—eastern district.

Endorsement: No. 190 January term, 1901. Supreme court of Pennsylvania, eastern district. Borough of New Hope *v.* Postal Telegraph Cable Co. appellant. Præcipe for certiorari. Filed May 20, 1901 In supreme court. Frank R. Shattuck, attorney for appellant.

Petition for Allowance of an Appeal from Superior Court to Supreme Court.

Supreme Court of Pennsylvania.

BOROUGH OF NEW HOPE, Appellee,
v.
POSTAL TELEGRAPH CABLE CO., Appellant.

To the honorable the judges of said court:

21 The petition of the Postal Telegraph Cable Company, respectfully represents,

That it is the defendant and appellant in a certain action now pending in the superior court of Pennsylvania, for the eastern district thereof, of October term 1900 No. 128, wherein the Borough of New Hope is the plaintiff. Said action was originally commenced by the said Borough of New Hope in and for the county of Bucks,

in the State of Pennsylvania; was tried by a jury; judgment entered upon a verdict in favor of the plaintiff, and an appeal taken to the superior court of Pennsylvania, for the eastern district thereof, which said court by an opinion filed therein upon the fourteenth day of February, 1901, duly affirmed the said judgment.

The claim of the plaintiff, the said Borough of New Hope, against the defendant, is to recover license fees for four years from October 1st, 1895, sought to be imposed upon the defendant by a certain ordinance of the borough of New Hope, approved July 10, 1894, by the terms of which for the maintenance of each and every telegraph, telephone or electric light pole within the limits of the said borough of New Hope, the owner or lessee thereof is required to pay to the borough treasurer an annual license fee of one dollar and for the maintenance of each and every mile of telegraph, telephone and electric light wire within the limits of the said borough, an annual license fee of two dollars and fifty
22 cents. The claim of the said borough in said action was to recover upon 68 poles and 28 miles of wire, for four years at $138 a year, or a total of $552 and interest. The jury rendered a verdict in the amount of $466.40. The poles and wires situated in the borough of New Hope are a part of the telegraph line of the defendant company, which begins in New York city, extends through the State of New Jersey, crossing the Delaware river into Pennsylvania, about four miles from New Hope, thence passing through the borough of New Hope to Philadelphia, and thence extending through the State of Delaware and Maryland to the District of Columbia, carrying wires that go also through the Southern States to New Orleans, and also carrying wires that branch off from Philadelphia going West through the States of Pennsylvania, Ohio, Indiana and Illinois to Chicago. This line is used by the defendant wholly for the transmission of telegraph messages between the different States of the United States and for cable messages to be transmitted from the United States to foreign countries, and known as through circuits, there being no local wires operating or assigned for the conduct of business or of the carrying on business within the State of Pennsylvania on the line upon which these license fees were sought to be imposed. No local business arising in the said borough of New Hope was carried on by the defendant, and no office was maintained by it in said borough. There was no cost or expense imposed upon
the said borough, as was affirmatively shown on the trial of
23 the cause, nor was there any supervision or regulation whatsoever by the said borough, of the said poles and wires.

Under the facts as proved at the trial of this case, the defendant contended that there was no power in the borough of New Hope to levy such a license fee or tax, by ordinance or otherwise, or any authority for so doing; because the defendant in the transaction of the business carried on by means of said poles and wires, was engaged in the transaction of commerce between the States and between the United States and foreign countries, the attempted imposition of the license fees in question was in fact a regulation of commerce between

the States and that the ordinance was therefore void. It was admitted at the trial that defendant was a corporation of the State of New York and had filed a written acceptance of the post roads act of Congress of July 24, 1866. These facts were set up in the affidavit of defense, and proved upon the trial by testimony of witnesses called, and at the time of said trial the court was requested to charge the jury as follows:—

1. It appears from the uncontradicted evidence in this case that the poles and wires in the borough of New Hope, to recover for the charges upon which this suit is brought, form a part of the system of poles and wires of the defendant company, extending into and through the other States and Territories of the United States,
24 over and along which system of poles and wires (including therein the said poles and wires in the borough of New Hope) communication is carried by electricity and messages transmitted by said defendant company to and from citizens of other States and to and from such citizens of other States from and to citizens of the State of Pennsylvania, which said business is commerce between the States within the meaning of the Constitution of the United States. Therefore, the borough of New Hope has no right to impose any charge for the privilege of erecting and maintaining said poles and wires in said borough except only such sum as will reasonably cover and reimburse to it the expenses to which it may be subjected in consequence of the erection and maintenance of said poles and wires and if the license fees sued for in this case exceed said sum your verdict should be for the defendant.

2. It appears from the uncontradicted evidence in this case that no costs or expenses are imposed upon the borough of New Hope in consequence of the erection and maintenance of the poles and wires of the defendant company, and as said borough is without power to exact any charge for the management of said telegraph poles and wires, the ordinance of said borough of July 10, 1894, sued on in this case, is void and the verdict of the jury should be for the defendant.

3. The evidence in this case shows that the amount of the
25 license fee sought to be imposed upon the defendant is excessive in amount and the ordinance of the plaintiff is therefore illegal and void, and the verdict must be for the defendant.

4. Under the evidence in this case the verdict of the jury should be for the defendant.

The trial judge affirmed the first of these points, and refused the others. Upon the appeal, the refusal of these points was, *inter alia*, assigned for error.

Upon the argument in the superior court, the point involved was the power of the borough of New Hope to impose said license fees, because the said ordinance was a regulation of commerce between the States, and amounted to taxation upon interstate commerce, and therefore void; and it is also not within the power of the borough of New Hope to impose these license fees by reason of the provisions

of clause 3, section 8 of article 1 of the Constitution of the United States.

Your petitioner further avers that it denies in this case the right of the borough of New Hope to impose any license fees whatsoever upon its poles and wires, because the same are in fact a regulation of commerce between the States, and their imposition is not justified by any police power existing, or claimed to exist, in the said borough of New Hope, and that said police power confers no authority
26 or right to impose said fees, or any fees, upon said poles and wires.

Your petitioner avers that it is advised by counsel that this is a question involving the construction and application of the Constitution of the United States and the act of Congress of July 24, 1866, and therefore prays that an appeal may be allowed from the said judgment of the superior court, and that a certiorari be issued from this court, in accordance with law and the act of assembly in such case made and provided.

Annexed hereto is a copy of the opinion of the superior court affirming said judgment and filed herewith are copies of the paper books in said cause.

And it will ever pray etc.

POSTAL TELEGRAPH CABLE COMPANY,
By W. H. BAKER,
Vice President and General Manager.

STATE OF NEW YORK, } ss:
County of New York, }

William H. Baker being duly sworn according to law deposes and says that he is the vice president and general manager of The Postal Telegraph Cable Company, the defendant above named, and that the facts set forth in the foregoing petition, so far as stated
27 upon his own knowledge, are true, and so far as they are stated upon information derived from others, he verily believes them to be true.

WM. H. BAKER.

Sworn to and subscribed before me this 12th day of April, 1901.
THEODORE L. CUYLER, JR.,
[SEAL.] *Notary Public, Kings County.*

Certificate filed in N. Y. Co.

Statement of Grounds for Appeal.

Upon the argument in the superior court in this case, the power of the borough of New Hope to impose the license fees in question, was contested, upon the ground that they amounted to taxation upon interstate commerce, and the ordinance for this reason was void.

The case, therefore, directly involves the construction or application of the Constitution of the United States and the post roads act of Congress of July 24, 1866, and the appellant therefore believes it has the right to appeal to this court. It is believed by counsel that this case presents the question which it is desired to have determined, in a concise form and favorable for the defendant. The poles and wires for which license fees were imposed were a part of its line used entirely and wholly for interstate commerce; no
28 business whatever was transacted in the borough of New Hope; the defendant had no office there, and it appeared affirmatively that the borough of New Hope had not made any payments or disbursements for inspection or for regulating the line of the defendant, and that there was no inspection or regulation by the said borough, nor was there any cost or expense imposed upon it by the maintenance and existence of these poles and wires.

This court has undoubtedly in a number of cases involving the same point, decided the same adversely to the present contention of the defendant. This case is, however, of great importance, because of the large aggregate of charges of similar kind imposed by the cities and boroughs in this State.

The record in another case, appealed with this one, shows that at the same rate the total amount exacted from this defendant company, in the State of Pennsylvania, would be a sum exceeding $100,000 per annum.

This defendant company desires to have the question as to the right of the borough to impose such taxes under the guise of the exercise of their police powers, determined if possible by the Supreme Court of the United States. Because of the decisions already rendered by this court, the defendant would not again present this question for determination were it not for the fact of its desire to present the matter to the United States Supreme Court upon
29 an appeal from this court, if its decision is against the contention of the defendant, and thus have the question finally determined and settled.

In presenting this matter it is proper to state that it is the belief of the defendant that the appeal is of right and not of grace, and counsel desire to state that the endeavor will be made to make the burden of the disposition of the case, as light as possible.

FRANK R. SHATTUCK,
Att'y for Appellant.

Endorsement: 190 January term 1901. Borough of New Hope, appellee *v.* Postal Telegraph Cable Company, appellant. Petition of Postal Telegraph Cable Co. for an allowance of an appeal from the superior court of Penna. to the supreme court of Penna. May 1, 1901 appeal allowed. *Per curiam.* Filed April 22, 1901. In supreme court.

Assignments of Error.

In the Supreme Court of Pennsylvania, Eastern District, January Term, 1901. No. 190.

BOROUGH OF NEW HOPE
v.
POSTAL TELEGRAPH CABLE CO. } No. 190, January Term, 1901.

Assignments of error.

First. The learned superior court erred in affirming the judgment of the court of common pleas of Lackawanna county, of January term 1899, No. 10.

Second. The learned superior court erred in not reversing
30 the judgment of the court of common pleas of Lackawanna county, of January term 1899, No. 10.

F. R. SHATTUCK,
Att'y for Postal Telegraph Cable Co., Appellant.

Endorsement: In the supreme court of Penna. eastern dist. January term 1900. No. 190. Borough of New Hope *v.* Postal Tel.-Cable Co. Assignments of error. Filed Feb. 24, 1902. In supreme court.

31 *Opinion.*

Supreme Court of Pennsylvania, Eastern District, January Term, 1901.

BOROUGH OF NEW HOPE
v.
POSTAL TELEGRAPH CABLE CO., App't. } No. 190.

Appeal and certiorari from the judgment of the superior court of Pennsylvania of October term, 1900, No. 120, affirming the judgment of the court of common pleas of Bucks county.

Filed May 19, 1902.

Per curiam:

The judgment in this case is affirmed on the opinion of Judge Rice of the superior court.

In the Superior Court of Pennsylvania, Sitting at Philadelphia.

Among the records and proceedings of the superior court
32 of Pennsylvania, sitting at Philadelphia, *inter alia*, the following is thus contained:

APPEARANCE DOCKET.

Docket Entries.

Superior Court, October Term, 1900.

BOROUGH OF NEW HOPE, Plaintiff,
—
POSTAL TELEGRAPH CABLE COMPANY, Defendant. } No. 128.

Appeal of defendant, C. P. No. 10, Jan. T., 1899, from the judgment.

Appeal from the court of *common pleas* of the county of *Bucks*.
Filed June 8, 1900.
Eo die certiorari exit
Ret'ble third Monday of November 1900.

November 14, 1900.—Record returned and filed.
November 12, 1900.—Assignments of error filed.
November 21, 1900.—Argued.
February 14, 1901.—Judgment affirmed. *Per curiam.*
February 25, 1901.—Remittitor exit and with record and
33 copy of opinion sent to the prothonotary of Bucks county.

In Supreme Court.

April 22, 1901.—Petition for an allowance of an appeal from the superior court to the supreme court filed on motion of F. R. Shattuck, Esq.,
May 1, 1901.—Appeal allowed. *Per curiam.*

In supreme court No. 190 January term 1901.

Appeal and Affidavit.

In the Superior Court of Pennsylvania, Sitting at Philadelphia.

BOROUGH OF NEW HOPE, Plaintiff,
v.
POSTAL TELEGRAPH CABLE COMPANY, Defendant. } No. 10. Court of Common Pleas of the County of Bucks, Jan. Term, 1899.

34 Enter appeal on behalf of Postal Telegraph Cable Co. from judgment of the court of common pleas of the county of Bucks.

F. R. SHATTUCK,
Att'y for Def't.

To Charles S. Greene, proth'y sup. ct.

COUNTY OF PHILADELPHIA, *ss:*

Chas. C. Adams, sup't being duly sworn saith that said appeal is not taken for the purpose of delay, but because appellants believe they have suffered injustice by the judgment from which they appeal.

CHARLES C. ADAMS,
Superintendent.

Sworn and subscribed this 7th day of May A. D. 1900

[SEAL.] EDWARD EVERITT,
Notary Public.

Endorsement: No. 128 October term 1900. Superior court
35 of Pennsylvania, sitting at Philadelphia. Borough of New Hope *v.* Postal Telegraph Cable Company, appellant. Appeal and affidavit. Filed Jun- 8, 1900. In the superior court. F. R. Shattuck attorney for appellant.

Præcipe for Certiorari.

In the Superior Court of Pennsylvania, Sitting at Philadelphia.

BOROUGH OF NEW HOPE *v.* THE POSTAL TELEGRAPH CABLE COMPANY, Appellant.	Certiorari to the Court of Common Pleas of the County of Bucks of January Term, 1899. No. 10.

Issue certiorari to the court of common pleas of the county of Bucks to bring up record and proceedings in a certain action in said court, No. 10 Jan'y term 1899 wherein Borough of New Hope is plaintiff and The Postal Telegraph Cable Company is defendant. Returnable to next term, *sec. reg.*

36 *Assignments of Error.*

In the Superior Court of Pennsylvania, Sitting at Philadelphia.

BOROUGH OF NEW HOPE
v.
POSTAL TELEGRAPH CABLE COMPANY.

Assignments of error.

First. The learned court below erred in charging the jury as follows:—

"Now, then, gentlemen, the borough of New Hope or any other like municipality has the right to impose upon corporations such as

this using its streets and highways by ordinance, such con-
37 ditions and regulations as are necessary for the general protection of the streets and the uses of the same in the borough. They may by proper reasonable ordinance define where poles shall be planted and where the lines shall be run. And in order that this provision may be complied with and this power exercised they may require that they be inspected, examined and cared for, that they do not become public nuisances or otherwise injurious to the public and to the municipality. And in order to provide such a regulation they may impose a license fee upon the property which is the subject of their surveillance and care and they cannot be questioned in doing this, provided that fee is a reasonable one, a just one, under the circumstances and is commensurate with the probable requirements of the exercise of their police or supervisory power."

Second. Because the learned court below erred in charging the jury as follows:—

"Now, then, gentlemen, while the question as to whether an ordinance is reasonable or not is for the court, and the court does not propose to evade that question, yet, I have concluded to obtain the assistance and judgment of this jury as to whether an assessment such as this, under the circumstances of this case, is reasonable or unreasonable, under the law as I have laid it down, for this surely involves the facts. Now, if you believe that it is unreason-
38 able according to the facts, you will render a verdict for the defendant; if you believe that it is reasonable and should be paid in the full amount, you will render a verdict for the plaintiff for the amount of this claim, and the court hereafter will regulate judgment in accordance with such views, either upon a motion for a new trial, or otherwise, as we shall entertain, after having this opinion from you in aid of its judgment and to determine the doubt on the facts."

Third. Because the learned court below erred in refusing to affirm the defendant's second point as follows:—

"2. It appears from the uncontradicted evidence in this case that no costs or expenses are imposed upon the borough of New Hope in consequence of the erection and maintenance of the poles and wires of the defendant company. As said borough is without power to exact any charge for the maintenance of the said telegraph poles and wires, the ordinance of the said borough of July 10, 1894, sued on in this case, is void, and the verdict of the jury should be for the defendant."

Fourth. Because the learned court below erred in refusing to affirm the defendant's third point as follows:

"3. The evidence in this case shows, that the amount of
39 the license fee sought to be imposed upon the defendant is excessive in amount, and the ordinance of the plaintiff is therefore illegal and void, and the verdict must be for the defendant."

Fifth. Because the learned court below erred in refusing to affirm the defendant's fourth point as follows:

"4. Under the evidence in this case, the verdict of the jury should be for the defendant."

F. R. SHATTUCK,
Att'y for Defendant.

Endorsement: 128 Oct. 1900. Superior court. Borough of New Hope *v.* Postal Telegraph Cable Co., appellant. Assignments of error. Filed Nov. 12, 1900. In the superior court.

40 *Opinion.*

In the Superior Court of Pennsylvania.

BOROUGH OF NEW HOPE *v.* POSTAL TELEGRAPH CO. } No. 128, Oct. Term, 1900. Appeal from Judgment of C. P. of Bucks Co.

Per curiam:

This case differs in no essential features from the case of the same borough against the Western Union Telegraph Co. No. 101, October term, 1900, in which we have this day filed an opinion. Judgment affirmed.

Endorsement: No. 128 October term 1900. In the superior court of Pennsylvania. Borough of New Hope *v.* Postal Telegraph Co. Affirmed. Appeal from judgment of C. P. of Bucks county. Filed in the superior court, Feb. 14, 1901. *Per curiam.*

(The opinion above referred to is as follows:)

In the Superior Court of Pennsylvania.

BOROUGH OF NEW HOPE *v.* WESTERN UNION TELEGRAPH CO. } No. 101, October Term, 1900. Appeal from Judgment of C. P. of Bucks County.

Per curiam:

It has been decided, first, that the adoption by a city of an ordinance imposing a reasonable annual license fee for each pole and each mile of suspended wire erected and maintained by telegraph, telephone and electric light companies within city limits is a valid exercise of police power; second, that boroughs have equal powers with cities in that regard; third, that such ordinance is not, as to telegraph companies engaged in the business of transmitting messages between the several States of the Union in violation of
41 the commerce clause of the Federal Constitution; fourth, that in an action to recover the license fee for a particular year, the same being payable at the beginning of the year, the fact that the borough or city did not expend money for inspection, super-

vision, or police surveillance of the poles and wires in that year is not a defense; fifth, that the courts will not declare such ordinance void because of the alleged unreasonableness of the fee charged unless the unreasonableness be so clearly apparent as to demonstrate an abuse of discretion on the part of the municipal authorities; W. U. Tel. Co. *v.* Philadelphia, 22 W. N. C., 39; s. c. 11 Cent. Rep., 102; Allentown *v.* W. U. Tel. Co., 148 Pa., 117; Chester *v.* P. R. & P. Tel. Co., 148 Pa., 120; Chester *v.* W. U. Tel. Co., 154 Pa., 466; Philadelphia *v.* Am. Union Tel. Co. 167 Pa., 406; Ridley Park *v.* Citizens' Electric Light & Power Co., 9 Pa. Superior Ct. 615; Lansdowne *v.* Same, 9 Pa. Superior Ct., 620; North Braddock *v.* Central, etc., Tel. Co., 11 Pa. Superior Ct., 2[illegible]; Kittanning Electric Light Co. *v.* Kittanning, 11 Pa. Superior Ct., 31. See also McKeesport *v.* McKeesport, etc., R'y Co., 2 Pa. Superior Ct., 242; North Braddock *v.* Second Ave. Tr. Co., 8 Pa. Superior Ct., 233; Lansdowne *v.* Delaware, etc., Electric R'y Co., 9 Pa. Superior Ct., 621, and Taylor *v.* C. P. Tel., etc., Co., 8 Pa. Dist. Rep., 92.

In many of the foregoing cases the license fee was the same as that imposed by the ordinance under consideration. In none
42 of the cases was the ordinance declared void for unreasonableness, although it was inferentially conceded that a case might arise where the license fee would be so grossly disproportioned to the burden imposed upon the municipality in consequence of the erection and maintenance of the poles and wires as to warrant the court in presuming that the ordinance was a revenue measure, not a police regulation. None of the cases lays down a fixed and unvariable rule by which that question is to be determined, but after a comparison of the facts developed on the trial of this case, with the facts of some of the cases above cited, we have been led by the conclusion that the court would not have been justified by the precedents in declaring the ordinance void. The facts being undisputed, we take it that the question of the validity of the ordinance was for the court to decide. But, if on the undisputed facts, the court would not have been warranted in declaring the ordinance void, the submission of the question of the reasonableness of the fee to the jury was an error of which the defendant has no just cause to complain.

Judgment affirmed.

Endorsement: No. 101 October term 1900. In the superior court of Pennsylvania. Borough of New Hope, *v.* Western Union Telegraph Co. Affirmed. Appeal from judgment of C. P. of Bucks county. Filed in the superior court Feb. 14, 1901. *Per curiam.*

43 *Record of the Court of Common Pleas of Bucks County.*

Exemplification.

COMMONWEALTH OF PENNSYLVANIA, } ss:
Bucks County, }

Among the records and proceedings of the court of common pleas in and for the county of Bucks, in the State of Pennsylvania, it is, *inter alia*, thus contained:

Number 37, *Appearance Docket Entries.*

Of January Term, 1899, No. 10.

DEC. 22ND.

THE BOROUGH OF NEW HOPE
v.
THE POSTAL TELEGRAPH CABLE COMPANY. } 10. Action of Assumpsit.

William C. Ryan.
Frank R. Shattuck.
R. M. Yardley.

44 *Costs.*

Sheriff	$5.70
1 subp. P	.60
1 " D	.60
Proth'y	3.50
Att'y	3.00
T. & W	2.00
Cr	.13
Dis	.25
Verdict fee	4.00
Judgment	1.25
	$21.03

December 22nd, 1898.—Statement of plaintiff's claim filed

To the hon. the judge within named:

December 23rd, 1898.—Summoned The Postal Telegraph Cable Company the within named defendant by leaving a true and attested copy of the within writ, with C. C. Adams, sup't of said defendant company at the superintendent's office No. 1031 Chestnut street, Philadelphia, and informing him of the contents thereof. So answers

IRVIN AARON, *Sheriff.*

I Warren S. Ely do certify that I served the plaintiff's statement of demand in the within mentioned suit on The Postal Telegraph Cable Company the within named defendant by leaving a true and attested copy with C. C. Adams superintendent of said defendant company at the superintendent's office, 1031 Chestnut street, Philadelphia, and informing him of the contents thereof on the 23rd day of Dec. A. D. 1898.

WARREN S. ELY.

Affirmed and subscribed before me this 24th day of December A. D. 1898.

EMIL W. HARING, *Proth'y.*

January 10, 1899.—Affidavit of defense filed.
March 21, 1899.—The defendant pleads non assumpsit.
October 17, 1899.—Jury empaneled and sworn.
Eo die verdict in favor of the plaintiff for the sum of
45 $466.40 *dollars* and six cents costs.
October 19, 1899.—Motion and reason for new trial filed.
October 27, 1899.—Notes of testimony filed.
December 5, 1899.—Argued and *C. A. V.*

And now, to wit: February 25, 1900, the rule for a new trial is discharged and judgment for plaintiff:
By the court

HARMAN YERKES,
President Judge.

March 8, 1900.—Received of William C. Ryan, Esq., $4.00 verdict fee.
March 8, 1900.—Judgment entered.
Taxed to Docket No. 33 page 352.
June 9, A. D. 1900.—Certiorari from superior court came to hand.
Eo die appeal bond filed.
Feb'y 27, 1901.—Remitter and record returned.
Eo die judgment affirmed.
May 20, 1901.—Certiorari to supreme court came to hand.

Præcipe for Summons.

In the Court of Common Pleas of Bucks County.

THE BOROUGH OF NEW HOPE
v.
THE POSTAL TELEGRAPH CABLE Company.
} No. 10, January Term, 1899. Action of Assumpsit.

46 Emil W. Haring, Esq., prothonotary:

Issue summons in action of assumpsit as above. Returnable next term.

WM. C. RYAN,
Att'y for Plaintiff.

Dec. 22, 1898.

Endorsement: No. 10 January term 1899. In the court of common pleas of Bucks county. Borough of New Hope *v.* The Postal Telegraph Cable Co. Action of assumpsit. Præcipe for summons. Filed Dec. 22, 1898. Wm. C. Ryan, att'y.

Action of Assumpsit.

BUCKS COUNTY, *ss:*

The Commonwealth of Pennsylvania to the sheriff of the county of Bucks, Greeting:

We command you, that you summon the Postal Telegraph Cable Company so that it be and appear before our court of common pleas, to be holden at Doylestown, in and for the said county, on the second day of January next, there to answer the Borough of New Hope in an action of assumpsit. And have you there this
47 writ.

Witness, the Honorable Harman Yerkes, president of our said court at Doylestown, this twenty-second day of December, in the year of our Lord one thousand eight hundred and ninety-eight.

[SEAL.] EMIL W. HARING,
Prothonotary.

To the hon. the judge within named:

December 23rd 1898 summoned The Postal Telegraph and Cable Company the within named defendany by leaving a true and attested copy of the within writ with C. C. Adams, sup't of said defendant company, at the superintendent's office at No. 1031 Chestnut street Philadelphia, and informing him of the contents thereof.

So answers

IRVIN AARON, *Sheriff.*

I, Warren S. Ely, do hereby certify that I served the plaintiff's statement of demand in the within mentioned suit on The Postal Telegraph Cable Company the within named defendant by leaving a true and attested copy with C. C. Adams, sup't of said defendant company, at the superintendent's office at No. 1031 Chestnut street Philadelphia and informing him of the contents thereof on the 23rd day of December, A. D. 1898.

WARREN S. ELY.

Affirmed and subscribed before me this 24th day of December A. D. 1898.

EMIL W. HARING, *Proth'y.*

48 Endorsement: No. 10 January term 1898 The Borough of New Hope *v.* The Postal Telegraph Cable Company. Action of assumpsit. To the defendant within named: You are hereby notified, that if a copy of the statement of plaintiff's demand is served on you not less than fifteen days before the return day of this writ, which will be the second day of January 1899 it will be

your duty to file an affidavit of defense, on or before the said return day; or, if notice that plaintiff's statement of demand has been filed is served on you, on or after the said return day, it will be your duty to file an affidavit of defense within fifteen days after service on you of said notice. Emil W. Haring, prothonotary. William C. Ryan, attorney. Sheriff's costs $5.70

Plaintiff's Statement.

In the Court of Common Pleas of Bucks County.

THE BOROUGH OF NEW HOPE *v.* THE POSTAL TELEGRAPH CABLE Company.	No. —, January Term, 1899. Action of Assumpsit.

49 Plaintiff's statement of claim.

The plaintiff claims of the defendant the sum of $552, being the sum total of charges due to the said plaintiff by the defendant, according to the following specifications, with interest from the first day of October of each year, hereinafter stated.

The proper authorities of the Borough of New Hope, on the tenth day of July, A. D. 1894, duly passed an ordinance entitled "An ordinance for the regulation of the introduction and maintenance of telegraph telephone and electric light poles and wires into and in the borough of New Hope," a copy of which is hereto attached, marked Exhibit "A" that the same may be taken as a part of this statement.

The said defendant prior to and since the first day of October, A. D. 1895, has maintained and used telegraph poles and wires within the corporate limits of said borough as follows:

In the year beginning October 1, 1895, 68 poles at $1.....	$68
In the year beginning October 1, 1896, 68 poles, at $1.....	68
In the year beginning October 1, 1897, 68 poles, at $1.....	68
In the year beginning October 1, 1898, 68 poles, at $1.....	68
In the year beginning Oct. 1, 1895 28 miles of wire, $2.50.	70
In the year beginning Oct. 1, 1896, 28 miles wire, $2.50.....	70
In the year beginning Oct. 1, 1897, 28 miles wire, $2.50.....	70
In the year beginning Oct. 1, 1898, 28 miles wire, $2.50.....	70
	552

50 By reason whereof the said defendant by force of said ordinance is indebted to the said plaintiff in the said sum of $552 with interest as aforesaid, wherefore said plaintiff brings its suit.

WM. C. RYAN,
Att'y for Plaintiff.

EXHIBIT A.

An ordinance for the regulation of the introduction and maintenance of telegraph, telephone and electric light poles and wires into and in the borough of New Hope.

SECTION 1. Be it ordained and enacted by the town council of the borough of New Hope, That before any telegraph, telephone or electric light poles shall be erected, or telegraph telephone or electric light wires shall be run, along, over or under any street, lane or alley of the borough of New Hope, permission to do so shall be first obtained from the town council, by the corporation, firm or individual who proposes to erect such poles and run such wires, such permission to be granted by ordinance only.

SECTION 2. That all telegraph, telephone and electric light poles, now erected or to be erected hereafter, in the borough of New Hope, which are or shall be owned or leased by any corporation, firm or individual, shall be designated by the names or initials
51 of such owners or lessees, and each of said poles shall have a distinctive number, together with the name or initial of such owner or lessee legibly marked thereon. On or before the 1st day of October next and annually thereafter, such owner or lessee shall make application to the burgess for a license to maintain the poles and wires theretofore erected, for the ensuing year specifying the poles by their designation of name or initials and number, as provided by this section, and wires by the streets along, over or under which they run. The burgess shall, upon the production to him, by the applicant of the receipt of the borough treasurer for the license fees hereinafter provided for, issue a license, which shall authorize the maintenance of the poles and wires designated in the application, for the period of one year from that date.

SECTION 3. That, for the maintenance of each and every telegraph, telephone and electric light pole within the limits of said borough of New Hope, the owner or lessee thereof shall pay to the borough treasurer an annual license fee of one dollar and for the maintenance of each and every mile of telegraph telephone and electric light wire within the limits of said borough, the owner or lessee thereof shall pay to the borough treasurer for the use of said borough an annual license fee of two dollars and fifty cents.

SECTION 4. That any corporation, firm or individual, who shall fail to comply with the requirements of this ordinance shall be subjected to a penalty of $100.00 for each and every offense, to
52 be recovered in like manner as debts for penalties of like amount are recoverable.

By order of council.

C. C. B. JOHN, *Burgess.*

Attest: CHARLES HEIGH, *Secretary.*

New Hope, Pa., July 10th, 1894.

Endorsement: No. 10 January term 1899 In the court of common pleas of Bucks county. The Borough of New Hope *v.* The Postal Telegraph Cable Company. Plaintiff's statement. Filed Dec. 22nd, 1898. Wm. C. Ryan, att'y.

Affidavit of Defense.

In the Court of Common Pleas of Bucks County.

THE BOROUGH OF NEW HOPE
v.
THE POSTAL TELEGRAPH CABLE COMPANY. } No. 10, January Term, 1899. Action of Assumpsit.

PHILADELPHIA COUNTY, *ss*:

53 Charles C. Adams, being duly sworn according to law, says that he is the superintendent of The Postal Telegraph Cable Company, the above defendant, for the territory including Bucks county, Pennsylvania, and that the said company has a full, just and true defense to the whole of the plaintiff's claim of the following nature:

Deponent is advised, and therefore alleges, that the statement of claim filed in the above case is defective and insufficient in law, and that it is not such a statement as requires the defendant to file an affidavit of defense; and further, that the said Exhibit A, attached thereto, is not sufficiently described and referred to, in order that the same shall be taken and considered to be a part of the plaintiff's statement. Reserving, therefore, the right to take advantage at any time hereafter of the said manifest insufficiencies in the said statement of claim, deponent further avers:

That the Postal Telegraph Cable Company, the above defendant, is a corporation duly organised and existing under the laws of the State of New York, and has paid to the Commonwealth of Pennsylvania all taxes upon the value of its poles and wires as included in and represented by its capital and upon the gross receipts derived from the use thereof, and further, that it has accepted the act of Congress approved July 24, 1866, and that the poles and wires, in question, are principally employed and operated in the transmission of messages between the different States, and are therefore in-
54 struments of commerce, and for these reasons, the ordinance attached to the plaintiff's statement is illegal and void.

Deponent further avers that the borough of New Hope neither on the tenth day of July 1894, nor at any other time, had any right, power or authority vested in it to pass or enact an ordinance of the character and description, as set forth in Exhibit A attached to the plaintiff's statement, and impose a license tax upon defendant company; and the said ordinance having been passed by the council of the borough of New Hope, without authority of law, is therefore inoperative and void.

Deponent further avers that the amount of the charges claimed

to be due by said defendant, *are* unreaso-able, unjust and excessive. That said sum sought to be recovered is apparently imposed and is sought to be justified as a license merely, but the amount thereof is wholly disproportionate to the usual, ordinary and necessary expenses of inspecting and supervising said poles and wires, imposed upon the said borough of New Hope, but on the contrary is largely in excess thereof, the same amounting to more than two dollars per pole per year. That these taxes are also largely in excess of any additional liability of all kinds and character imposed upon the said borough of New Hope in looking after the safety of the said poles and wires and that they are properly maintained, and also in excess of any further liability which may or can arise to the said borough of New Hope by reason of any injuries to persons
55 or property which may arise or have arisen by reason of the erection of said poles and the stringing of said wires, within the limits of said borough. That the said charges are more than ten times the amount of all kinds and character of expenses or liability which may be or have been incurred by the said borough of New Hope by reason of all of the circumstances above set forth; and therefore, the assessing of such license tax or charge against defendant company is for the purpose of raising and producing revenue to said borough. For all of which said reasons, the said ordinance is invalid and therefore void and of no effect.

That during the period covered by the statement of claim filed in this case the actual expenses of the said borough of New Hope in inspecting the poles and wires of the defendant company, and supervising the same, and the liability imposed upon said borough and damages actually sustained by it by reason of the said poles being erected within its limits, have practically amounted to nothing; and that, therefore, even if, in the exercise of its police power, the right to enact such an ordinance existed without specific authority of law, nevertheless, for the reasons set forth, the amount of the said license fee is actually a tax for revenue purposes, because the amount thereof is manifestly unfair, unjust and unreasonable, and therefore said ordinance is void.

56 Deponent further states that said charge or tax, to recover which this suit is brought, is an attempt to tax the property of the defendant company situated in the said borough of New Hope and that inasmuch as said defendant company, as above set forth, has paid all of its corporation taxes to the State of Pennsylvania, its property in the said borough of New Hope is not subject to direct taxation, and for this reason the said ordinance, above mentioned, is illegal and void.

Deponent further avers that it is provided in section 2 of the said ordinance that application shall be made to the burgess for a license to maintain the poles and wires theretofore erected by telegraph and other corporations, and that the burgess shall, upon the production to him by the applicant of the receipt of the borough treasurer, issue a license which shall authorize the maintenance of the poles and wires designated in the application, for the period of one year from

said date. That no right, power or authority is given to or vested in the burgess of New Hope nor is it a part of his duties to issue such license, and therefore the said authorities of the borough of New Hope in so doing have exceeded their powers under the laws of the Commonwealth of Pennsylvania applicable to boroughs and the said ordinance is therefore illegal and void.

Deponent therefore avers that the said defendant company is in no way or manner liable to the said borough of New Hope; and that therefore neither the said sum of five hundred and fifty
57 two dollars, nor any other sum, is due to said plaintiff by it the said defendant.

CHARLES C. ADAMS,
Superintendent.

Sworn to and subscribed before me this 9th day of January, 1899.

[SEAL.] EDWARD EVERITT,
Notary Public.

Endorsement: 10 Jan. T. 1899 C. P. Bucks Co. Borough of New Hope *v.* The Postal Telegraph Cable Co. Affidavit of defense Filed Jan'y 10th, 1899.

Plea.

THE BOROUGH OF NEW HOPE *v.* POSTAL TELEGRAPH CABLE COMPANY. } C. P. of Bucks Co. No. 10 of January Term, 1899. Action of Assumpsit.

The defendant in above case pleads "non assumpsit"

ROBERT M. YARDLEY,
F. R. SHATTUCK,
Att'y- for Defendant.

To proth'y.

3–20–'99

58 Endorsement: 10 Jan'y T. 1899. C. P. Bucks Co. Borough of New Hope *v.* Postal Telegraph Cable Co. Plea. Filed March 21, 1899. F. R. Shattuck.

Notes of Testimony.

In the Court of Common Pleas of Bucks County.

THE BOROUGH OF NEW HOPE
v.
THE POSTAL TELEGRAPH CABLE COMPANY. } No. 10, Jan. Term, 1899. Action of Assumpsit.

William C. Ryan, Esq., attorney for plaintiff.
F. R. Shattuck and Silas W. Pettit, Esq., of Phila. and Robert M. Yardley, Esq., attorneys for defendant.

Notes of Testimony Taken at Doylestown, October 17, 1899.

The following testimony was given on behalf of plaintiff:

DAVID CUNNINGHAM, sworn.

Examined by Mr. RYAN:

Q. You are the secretary of the council of New Hope, are you not

A. Yes, sir.

59 Q. Will you look at the book which I show you? What is that book?

A. An ordinance book of the borough of New Hope.

Q. What does this book contain?

A. It contaims the ordinance passed.

Counsel for plaintiff offers the ordinance book in evidence and the ordinance involved in this case which is as follows:

Borough Ordinance, No. 10.

An ordinance for the regulation, introduction, and maintenance of telegraph, telephone, and electric light poles and wires into and in the borough of New Hope.

SECTION 1. Be it ordained and enacted by the town council of the borough of New Hope That before any telegraph, telephone or electric light poles shall be erected, or telegraph, telephone or electric wires shall be run along, over or under any street, lane or alley of the borough of New Hope, permission to do so shall be first obtained from the town council by the corporation firm or individual who proposes to erect such poles and run such wires, such permission to be granted by ordinance only.

SECTION 2. That all telegraph, telephone and electric light poles now erected or to be erected hereafter in the borough of New Hope which are or shall be owned or leased by any corporation firm or individual shall be designated by the names or initials of

60 such owners or lessees, and each of said poles shall have a distinctive number, together with the name or initials of such

owners or lessees, legibly marked thereon, — or before the first day of October next and annually thereafter such owner or lessee shall make application to the burgess for a license to maintain the poles and wires theretofore erected for the ensuing year, specifying the poles by their designation of name or initials and number as provided by this section, and wires by the streets along, over or under which they run. The burgess shall upon the production to him by the applicant of the receipt of the borough treasurer for the license fees hereinafter provided for, issue license which shall authorize the maintenance of the poles and wires designated in the application for the period of one year from that date.

SECTION 3. That for the maintenance of each and every telegraph, telephone or electric light pole within the limits of said borough of New Hope, the owner or lessee thereof shall pay to the borough treasurer an annual license fee of one dollar, and for the maintenance of each and every mile of telegraph, telephone and electric light wire within the limits of said borough the owner or lessee thereof shall pay to the borough treasurer for the use of said borough an annual license fee of two dollars and fifty cents.

61 SECTION 4. That any corporation, firm or individual who shall fail to comply with the requirements of this ordinance shall be subjected to a penalty of one hundred dollars for each and every offense to be recovered in like manner as debts for penalties of like amount are recoverable.

By order of council passed and approved July 10, 1894.

(Signed) C. C. B. JOHN, *Burgess.*

Attest: CHARLES HAIGH, *Secretary.*

Published and fifteen copies posted in conspicuous places.

Attest: DAVID CUNNINGHAM, *Secretary.*

This suit is to recover the license fee only.

JOHN MARKEY, sworn.

Examined by Mr. RYAN:

Q. You are the assessor of New Hope, are you.

A. Yes, sir.

Q. Have you any knowledge of the poles and wires maintained in New Hope borough by the defendant in this case?

A. I have.

Q. State to the court and jury how many poles the Postal Telegraph Cable Co. has maintained in New Hope borough since October 1, 1895?

62 A. 68 poles. They have had 68 poles, part of the time, and they have increased them five poles I think since 1895.

Q. How many were there on October 1, 1895?

A. 68 poles.

Q. October 1, 1896.

A. 68 poles.

Q. October 1, 1897?
A. I would not be positive, I think perhaps that is the year they put in two poles or three. There were still 68 poles there.
Q. There have been at least 68 poles?
A. Yes, there has been at least 68 poles since 1894.
Q. How many miles of wire have they maintained in the borough during the same period?
A. There was 28 miles.

Cross-examined—Mr. PETTIT:

Q. When did you get this information, when did you count these poles and measure these wires?
A. I have counted those poles since 1894, every year.
Q. You have counted them every year?
A. Yes, sir.
Q. And measured them every year?
A. No, sir; I have measured them this year.
63 Q. How long have you been assessor?
A. Eight years.
Q. Did you ever perform any other duty in connection with telegraph poles and wires?
A. What do you mean?
Q. Did you ever do anything else?
A. Yes, I worked.
Q. In connection with the poles and wires of the telegraph Co.?
A. No, I don't think I did, only in making the borough assessment.
Q. But I am talking about poles and wires of the telegraph company. You never did anything except count them once a year, and this last time measured them?
A. Yes, that is all.
Q. Is there more than one constable in New Hope?
A. Not to my knowledge.
Q. Do you know whether he gets any salary from the borough or not?
A. I do not.

Plaintiff rests.
Defendant opens.
It is admitted that this defendant is a corporation of the State of New York, and has filed a written acceptance of the post roads act of Congress of July 24, 1866.

64 CHARLES C. ADAMS, sworn.

Examined by Mr. SHATTUCK:

Q. What is your business?
A. I am superintendent of the third district, eastern division of the Postal Telegraph Cable Company.

Q. And that district includes the county of Bucks and the borough of New Hope?

A. Yes.

Q. You are familiar with the Postal Telegraph Company's line that goes through the borough of New Hope?

A. I am.

Q. Where does it start?

A. The line begins in New York city, extends through the State of New Jersey crossing the river into Pennsylvania at Stockton about four miles up the river from New Hope, comes down the river to New Hope, passes through New Hope borough and on through to Philadelphia, on through Philadelphia to the Delaware State line, through Delaware to Maryland and through Maryland to the District of Columbia, carrying wires that go also through the Southern States to New Orleans, also carrying wires that branch off to Philadelphia going West, through the State of Ohio, through to Chicago.

Q. What character or class of business, telegraph business, is performed by the company over these wires that go through the borough of New Hope?

65 A. They are all known as through circuits, that is circuits connecting New York with cities in Pennsylvania, in Maryland and cities south of Washington, including Washington, and Western cities, known as through circuits. There are no local circuits.

Q. What do you mean by the statement that there are no local circuits?

A. I mean by that that there are no local wires operating or assigned for the conduct of business, of the carrying of business within the State of Pennsylvania on that line.

Q. Have you any public local office in New Hope?

A. We have no public local office there, no.

Q. From October 1, 1895 to October 1, 1898, the period for the recovery of the license charges this suit is brought, has there been a commercial office at New Hope?

A. There is no commercial or public office at New Hope. No office on which business is received, for which we charge tolls. We maintain a local test station there, having an operator and lineman for the purpose of testing our wires for the proper maintenance of the line.

Q. Mr. Adams, what is the value of the entire line of the Postal Telegraph Cable Company in the borough of New Hope?

A. It is less than $800.

Q. Can you show how that calculation is arrived at?

66 A. I can.

Q. Just tell us.

(Mr. Ryan objects. The objection is not pressed.)

A. The items of the cost of construction are as follows: 68 poles at $3 a pole, delivered, amounting to $204, and allowing $2.50 per pole

for labor in the erection of the poles, including the cost of the cross-arms and pin $170. 28 miles of iron wire at $18 per mile $336, and the labor of stringing the wire at $2.50 per mile $70; making a total of $780.

Q. The claim of the plaintiff here is $138 per year. What per cent. of the cost of the line, the value, is that?

A. That would be about 17 per cent.

Cross-examined. No questions.

THOMAS O'ROURKE, sworn.

Examined by Mr. SHATTUCK:

Q. Where do you live?

A. I live in Lambertville.

Q. What is your business?

A. Lineman at New Hope.

Q. For whom do you work?

A. For the Postal Telegraph Company.

Q. How long have you been in their employ?

A. Since 1882.

Q. Since 1882 what have been your duties concerning this
67 line of telegraph in New Hope?

A. To keep up the line as lineman, repairman and test operator.

Q. So that during all that time you have been engaged for the defendant in inspecting and regulating its poles and wires?

A. Yes, sir.

Q. Where does this line run in New Hope? Just give us generally a description of the character of the territory through which it runs.

A. It runs down the main street. There are 18 poles on the main street.

Q. Then where?

A. Then runs up through the Windy Bush road, crosses the canal and then takes up through private property to the Windy Bush road.

Q. Outside of the main street in New Hope what is the character of the country through which it runs, built up or farm land?

A. A part of it is built up, other parts where it runs through the borough it runs through a wood cut along the byroad.

Q. Except in the borough of New Hope, the main street proper, is the territory what you call residence section or farm territory, the houses scattered?

A. They are scattered all but 18 poles that runs through the principal part of the borough.

68 Q. But outside of those 18 what is the character of the country through which the line runs?

A. Part of it is built up and part is not.

Q. By built up do you mean the houses are right one against the other or separated?

A. Separate.

Q. You stated that you had been constantly employed along this line in the borough?

A. Yes, sir.

Q. Do the borough authorities do anything whatever in the way of inspection of this line?

A. No, sir.

Cross-examined by Mr. RYAN:

Q. There are 68 poles within the borough limits are there?

A. Yes, sir.

Q. And 28 miles of wire as testified by Mr. Markey?

A. Yes, sir.

DAVID CUNNINGHAM, recalled.

Examined by Mr. SHATTUCK:

Q. You have been sworn. You are the secretary of the council of the borough of New Hope?

A. Yes, sir.

Q. And have been since when?

69 A. October 1894 continuously.

Q. Since October 1894 has the borough of New Hope made any payments or disbursements for inspection or regulating the line of telegraph for the Postal Telegraph Co.?

A. No, sir.

Cross-examined. No questions.

Defendant rests.

Charge to the Jury by Judge Yerkes.

GENTLEMEN OF THE JURY: The case which you are trying is one to recover on behalf of an incorporated borough a license fee or tax for the occupancy of its streets by a telegraph line and its poles. This license is sought to be collected in pursuance of a borough ordinance which was enacted by the borough of New Hope concerning the erection of poles and wires within its limits; and the question which arises under the evidence in the case is that of the validity of the ordinance, to be determined by the amount and character of the charges against the defendant.

Now a borough municipality has the right in the conduct of the affairs of the borough to enact such police regulations as may

70 be necessary and reasonable in the government of the town; but in this instance it has no right to go beyond the exercise of what is termed its police power. It has no authority arbitrarily to impose a tax for revenue which is not called for to ensure the

government, control and use of the particular property affected which is more properly termed a license, and if it imposes a tax and not a license it is required by the constitution of our State to levy that tax equitably between all parties affected of the same class of subjects.

A few years ago in a similar case I had occasion to refer to the law upon this subject, and as I have had no reason to change my views I will repeat what I then said: "It is settled that the rules, regulations and ordinances which a municipality may make to carry out the purposes of its charter must be reasonable and necessary and for the common good. If they are unreasonable, oppressive, or not to be endured, they are void. To determine whether a regulation is reasonable, regard must be had to its object and necessity, and the court is to determine this. It has been held that municipalities cannot make unwarranted discrimination in particular cases or arbitrary charges with the penalty of forfeiture. There is a distinction between a power to exact money by license as a police regulation and the same power when for revenue purposes, which is of the
71 utmost importance. If the power be granted with a view to revenue, the amount of the tax, if not limited by the charter, is left to the discretion and judgment of the municipal authorities; but if it be given as a police regulation merely, a much narrower construction is adopted. The power must then be exercised as a means of regulation and cannot be used as a source of revenue. When a lince-se fee is exacted as a police power it will be limited to the necessary and probable expenses of issuing the license and of inspecting and regulating the business the license covers.

Now then, gentlemen, the borough of New Hope or any other like municipality has the right to impose, upon corporations such as this using its streets and highways, by ordinance, such conditions and regulations as are necessary for the general protection of the streets and the uses of the same in the borough. They may by proper reasonable ordinances define where poles shall be planted and where the lines shall be run. And in order that this provision may be complied with and this power exercised they may require that they be inspected, examined and cared for, that they do not become public nuisances or otherwise injurious to the public and to the municipality. And in order to provide such a regulation they may impose a license fee upon the property which is the subject of their surveillance
72 and care, and they cannot be questioned in doing this providing that fee is a reasonable one; is a just one under the circumstances, and is commensurate with the probable requirements of exercising their police or supervisory power. Now the question arises in this case as to whether a tax imposed upon the poles and lines of the road such as has been stated here, amounting altogether to the sum of $138 a year, is a reasonable one or not. The court confesses that it has a great deal of doubt as a matter of fact and law as to whether this is a reasonable subjection or not. We are frank to say that we are inclined to the view that this is an arbitrary imposition of a license or tax rate. But it appears that our brethren

upon the bench in other localities have adjudged that similar rates are not unreasonable or unnecessary; but it is argued upon the part of the defense that in those cases there was not the same proof as has been developed here. There was not shown as clearly as there is here that the amount of money received as the result of the license was a clear revenue irrespective of any requirement for police regulation. In other words, that this borough seems to have imposed a license fee to be expended and used in the exercise of a power and a duty which it has failed to exercise at all.

Now then, gentlemen, while the question as to whether an
73 ordinance is reasonable or not is for the court, and the court does not propose to evade that question, yet I have concluded to obtain the assistance and judgment of this jury as to whether an assessment such as this is, under the circumstances of this case, is reasonable or unreasonable under the law, as I have laid it down, for this surely involves the facts. Now if you believe that it is unreasonable according to the facts you will render a verdict for the defendant; if you believe that it is reasonable and should be paid in the full amount you will render a verdict for the plaintiff for the amount of its claim, and the court hereafter will regulate judgment in accordance with such views, either upon a motion for a new trial or otherwise, as we shall entertain after having this opinion from you, in aid of its judgment, and to determine the doubt on the facts.

The following points have been submitted to me:

1. It appears from the uncontradicted evidence in this case that the poles and wires in the borough of New Hope, to recover for the charges upon which this suit is brought, form a part of the system of poles and wires of the defendant company extending into and through the other States and Territories of the United States, over and along *the* system of poles and wires (including therein the said poles and wires in the borough of New Hope) communication by electricity is carried on and messages transmitted by said de-
74 fendant company to and from citizens from other States, and to and from such citizens of other States from and to citizens of the State of Pennsylvania, which said business is commerce between the States within the meaning of the Constitution of the United States; therefore the borough of New Hope has no right to impose any charge for the privilege of erecting and maintaining said poles and wires in said borough except only such sum as will reasonably cover and reimburse to it the expense to which it may be subjected in consequence of the erection and maintenance of said poles and wires, and if the license fees sued for in this case exceed said sum your verdict should be for the defendant.

Affirmed.

2. It appears from the uncontradicted evidence in this case that no costs or expenses are imposed upon the borough of New Hope in consequence of the erection and maintenance of the poles and wires of the defendant company, and as said borough is without power to exact any charge for the maintenance of said telegraph poles and

wires the ordinance of the said borough of July 10, 1894, sued on in this case is void and the verdict of the jury should be for the defendant.

Refused.

3. Evidence in this case shows that the amount of license fee sought to be imposed upon the defendant is excessive in amount and the ordinance of the plaintiff is therefore illegal and
75 void, and the verdict must be for the defendant.

Refused.

4. Under the evidence in this case the verdict of the jury should be for the defendant.

Refused.

Now then, gentlemen, you will determine this question as to whether this is an excessive and unreasonable ordinance under the circumstances to which I have referred. If you believe it is an excessive and unreasonable license to exact under the circumstances, the verdict will be for the defendant.

October 17, 1899, before verdict the defendant excepts to the answers to points of law and the charge of the court and requests that the same may be reduced to writing and filed, and that a bill be sealed, which is now done.

HARMAN YERKES,
President Judge. [SEAL.]

Endorsement: In the court of common pleas of Bucks county. The Borough of New Hope *v.* The Postal Telegraph Cable Company. No. 10 Jan. T. 1899 Action of assumpsit. Notes of testimony. Filed October 27, 1899.

76 *Motion and Reason- for New Trial.*

In the Court of Common Pleas of Bucks County.

THE BOROUGH OF NEW HOPE
v.
THE POSTAL TELEGRAPH CABLE Company.
} No. 10, January Term, 1899. Assumpsit.

Now October 19, 1899 the defendant by its attorney- Frank R. Shattuck and Robert M. Yardley respectfully moves the court for a new trial in the above stated case and assigns the following reasons therefor:

1st. The court erred in not instructing the jury as requested by the defendant in its first written point submitted to the court.

2nd. The court erred in not instructing the jury as requested, by the defendant in its second written point submitted to the court for instruction.

3rd. The court erred in not instructing the jury as requested by the defendant in its third written point submitted to the court for instruction.

4th. The court erred in not instructing the jury as requested by the defendant in its *third* written point submitted to the
77 court for instruction.

ROBERT M. YARDLEY,
Attorney for Defendant.

Endorsement: No. 10 January term 1899. The Borough of New Hope *v.* The Postal Telegraph Cable Company. C. P. Motion and reasons for new trial. Filed October 19, 1899. Frank R. Shattuck Robert M. Yardley.

Opinion of the Court.

In the Court of Common Pleas of Bucks County.

THE BOROUGH OF NEW HOPE *v.* THE POSTAL TELEGRAPH CABLE Company. } No. 10, Jan. T., 1899. Action of Assumpsit.

Sur motion for a new trial.

By the COURT: This case is on all fours with The Borough of New Hope *v.* The Western Union Telegraph Company in which an opinion has just been filed. What we have there said will
78 apply to this case.

There is, however, a further point that the jury in that case rendered a verdict for the full amount of the claim, but in this case the verdict is for a reduced amount. This is a matter of which, under the view of the law we have taken, the plaintiff might complain, but is such good luck for the defendant, that it can well be satisfied. If we should adopt the course of setting aside verdicts of juries because by comparison they appear inconsistent we should destroy a very useful institution, the jury system.

And now, to wit, February 26, 1900, the rule is discharged, and judgment for plaintiff.

President judge:

HARMAN YERKES.

Endorsement: In the court of common pleas of Bucks county. The Borough of New Hope *v.* The Postal Telegraph Cable Company. No. 10 Jan. term 1899. Action of assumpsit. Sur motion for a new trial. Opinion of the court. Filed Feb. 26, 1900.

79 *Writ of Certiorari.*

In the Superior Court of Pennsylvania.

THE SUPERIOR COURT OF PENNSYLVANIA, *Sitting at Philadelphia,* } *ss:*

[SEAL.] The Commonwealth of Pennsylvania to the justices of the court of common pleas No. — for the county of Bucks, Greeting:

We being willing for certain causes, to be certified of the matter of the appeal of Postal Telegraph Cable Company, from the judgment in No. 10 January term 1899 wherein Borough of New Hope was plaintiff and the said appellant was defendant, before you, or some of you, depending, do command you, that the record and proceedings aforesaid, with all things touching the same, before the justices of our superior court of Pennsylvania, at a superior court to be holden at Philadelphia, the third Monday of November next, so full and entire as in our court before you they remain, you certify and send, together with this writ, that we may further cause to be done thereupon that which of right and according to the laws of the said State ought

80 Witness the Honorable Charles E. Rice, doctor of laws, president judge of our said superior court at Philadelphia, the eighth day of June in the year of our Lord one thousand nine hundred.

CHAS. S. GREENE,
Prothonotary.

To the honorable the judges of the superior court of the Commonwealth of Pennsylvania, sitting at Philadelphia:

The record and process, and all things touching the same, so full and entire as before us they remain, we certify and send, as within we are commanded.

HARMAN YERKES, [L. S.]
Pres't Judge.

I certify that Charles C. Adams and George G. Glenn are surety in the within case, in the sum of one thousand dollars.

EMIL W. HARING.
[SEAL.] *Prothonotary.*

Endorsement: 10 January term 1899 C. P. Bucks. No. 128 October term 1900. Superior court. Borough of New Hope *v.* Postal Telegraph Cable Company, appellant. Certiorari to the court of common pleas No. — for the county of Bucks Returnable the third Monday of November, 1900. Rule on the appellee, to appear and plead on the return-day of the writ. Recorded and filed June 9, 1900. Filed Nov. 1, 1900. In the superior court. F. R. Shattuck.

81 *Remittitur.*

In the Superior Court of Pennsylvania.

[SEAL.] The Commonwealth of Pennsylvania to the justices of the common pleas court for the county of Bucks, Greeting:

Whereas, by virtue of our writ of certiorari from our superior court of Pennsylvania, sitting at Philadelphia, returnable in the same court on the third Monday of November, in the year of our Lord one thousand nine hundred, a record was brought into the same court, upon appeal by Postal Telegraph Cable Company from your judgment made in the matter of No. 10 January term 1899 wherein Borough of New Hope was plaintiff and the said appellant was defendant.

And it was so proceeded in our said superior court, that the following judgment was made, to wit:

Judgment affirmed.

And the record and proceedings thereupon, and all things concerning the same, were (agreeably to the directions of the act of assembly in such cases made and provided) ordered by the said superior court to be remitted to the court of common pleas for the county of Bucks aforesaid, as well for execution or otherwise as to justice shall appertain: Wherefore we here remit.

82 *Writ of Certiorari.*

In the Supreme Court of Pennsylvania.

EASTERN DISTRICT OF PENNSYLVANIA, } 88:
City and County of Philadelphia, }

[SEAL.] The Commonwealth of Pennsylvania to the justices of the court of common pleas for the county of Bucks, Greeting:

We being willing for certain causes, to be certified of the matter of the appeal of Postal Telegraph Cable Company from the judgment of the superior court No. 128, October term 1900, in affirming the judgment of the court of common pleas of the county of Bucks, at No. 10 January term 1899 wherein Borough of New Hope
83 was plaintiff and the said appellant was defendant, before you, or some of you, depending, do command you, that the record and proceedings aforesaid, with all things touching the same, before the justices of our supreme court of Pennsylvania, in and for the eastern district forthwith, so full and entire as in our court before you they remain, you certify and send, together with this writ, that we may further cause to be done thereupon that which of right and according to the laws of this State ought.

Witness the Honorable J. Brewster McCollum, chief justice of our

said supreme court, at Philadelphia, the twentieth day of May in the year of our Lord one thousand nine hundred and one.

CHAS. S. GREENE,
Prothonotary.

To the honorable the judges of the supreme court of the Commonwealth of Pennsylvania, sitting in and for the eastern district:

The record and process, and all things touching the same, so full and entire as before us they remain, we certify and send, as within we are commanded.

HARMAN YERKES, *P. J.*

84 Endorsement: In C. P. Bucks. No. 10 January term 1899. In superior court. No. 128 October term 1900. No. 190 January term 1901. Supreme court. Borough of New Hope *v.* Postal Telegraph Cable Company, appellant. Certiorari to the court of common pleas for the county of Bucks. Returnable forthwith. Rule on the appellee, to appear and plead on the return-day of the writ. *In re* petition for an allowance of an appeal from the superior court. May 1, 1900. Appeal allowed. *Per curiam.* In testimony whereof witness my hand and official seal this 20th day of May, A. D. 1901. Chas. S. Greene, prothonotary. (Seal) Filed May 22, 1901. In supreme court. Frank R. Shattuck.

85 UNITED STATES OF AMERICA, }
State of Pennsylvania, } *ss:*

I, Charles S. Greene, prothonotary of the supreme court of Pennsylvania, eastern district, do hereby certify that the foregoing record pages 1 to 84 inclusive is a true and faithful copy of the record and proceedings of the supreme court of the State of Pennsylvania, eastern district, in a certain suit therein pending wherein The Postal Telegraph Cable Company was appellant, and The Borough of New Hope was appellee.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said supreme court of the State of Pennsylvania, eastern district at Philadelphia, the 9th day of July, 1902, and in the one hundred and twenty sixth year of the Independence of the United States.

Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.

CHAS. S. GREENE,
Prothonotary of the Supreme Court of Pennsylvania, Eastern District.

86 I, J. Brewster McCollum chief justice of the supreme court of Pennsylvania, do hereby certify, that Charles S. Greene was, at the time of signing the annexed attestation, and now is, prothonotary of the said supreme court of Pennsylvania, in and for the

eastern district, to whose acts, as such, full faith and credit are and ought to be given; and that the said attestation is in due form.

In witness whereof, I have hereunto subscribed my name this ninth day of July one thousand nine hundred and two.

J. BREWSTER McCOLLUM.

I, Charles S. Greene, prothonotary of the supreme court of Pennsylvania, in and for the eastern district, do certify, that the Honorable J. Brewster McCollum by whom the foregoing certificate was made and given, was, at the time of making and giving the same, and is now, chief justice of the supreme court of Pennsylvania; to whose acts, as such, full faith and credit are and ought to be given, as well in courts of judicature as elsewhere; and that his signature, thereto subscribed, is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said supreme court of Pennsylvania, in and for the eastern district, at Philadelphia, this ninth day of July one thousand nine hundred and two.

[Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.]

CHAS. S. GREENE.

87 In the Supreme Court of the United States of America.

BOROUGH OF NEW HOPE
against
POSTAL TELEGRAPH-CABLE COMPANY, Appellant. } No. —, —— Term.

Assignments of Error.

1. The learned court erred in affirming the judgment of the superior court of Pennsylvania.

2. The learned court erred in not reversing the judgment of the superior court of Pennsylvania.

FRANK R. SHATTUCK,
Attorney for Defendant.

June 25, 1902.

[Endorsed:] No. — —— term. In the supreme court of the United States of America. Borough of New Hope against Postal Telegraph Cable Co. appellant. Frank R. Shattuck, att'y for appellant.

Endorsed on cover: File No. 18,614. Pennsylvania supreme court. Term No. 92. The Postal Telegraph-Cable Company, plaintiff in error, *vs.* The Borough of New Hope. Filed July 22d, 1902.

In the Supreme Court of the United States.

Postal Telegraph-Cable Company,
Plaintiff in Error,

against

The Borough of New Hope,
Defendant in Error.

October Term, 1903.

No. 92.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is a writ of error to a judgment of the Supreme Court of Pennsylvania. The action was commenced in the Court of Common Pleas of Bucks County, Pennsylvania, which entered judgment against the plaintiff in error, upon the verdict of a jury, and which judgment was in turn affirmed by the Superior Court of Pennsylvania and the Supreme Court of Pennsylvania.

The Borough of New Hope enacted an ordinance requiring all telegraph companies maintaining poles and wires within the borough limits to pay an annual license fee of one dollar ($1) for each pole, and two and one-half dollars ($2.50) for each mile of wire maintained. This action was brought to recover such license charge or tax for the five years beginning October 1, 1895, and ending October 1, 1899, upon the poles and wires of the plaintiff in error.

The defense was that the plaintiff in error was a corporation of the State of New York, and had paid to the Commonwealth of Pennsylvania all taxes upon the value of its poles and wires maintained in the Borough of New Hope; that it had accepted the Act of Congress of July 24, 1866; that the poles and wires were used for the transmission of telegraphic messages of the United States Government; that the highways upon which the poles and wires were constructed and operated are post roads and post routes, and said poles and wires constitute a part of the interstate telegraph system of the plaintiff in error, beginning in New York city and extending through several states to the city of New Orleans, with a branch from the city of Philadelphia to the city of Chicago, and known as through circuits; that the tax is illegal because it is a burden upon and regulation of interstate commerce, and, as such, prohibited by the commerce clause of the Constitution of the United States. The further defense was made that the borough authorities did nothing whatever in the way of making inspection of this telegraph line, and during the period sued for had made no payments or disbursements whatever for inspecting or regulating the same. The further defense was made that the assessment of such license fees or taxes was for the sole purpose of raising revenue, and that the amount of the same was more than seventeen per cent. per annum upon the entire cost or value of that part of the line in the said Borough of New Hope.

At the time of the trial the defendant called Mr. Charles C. Adams, its superintendent, at Philadelphia, included within whose jurisdiction was the County of Bucks, who testified to his knowledge of the poles and wires in question, and described their location, as above set forth, and that—

Q. Mr. Adams, what is the value of the entire line of the Postal Telegraph-Cable Company in the Borough of New Hope?

A. It is less than $800.

Q. Can you show how that calculation is arrived at?

A. I can.

Q. Just tell us.

A. The items of the cost of construction are as follows: 68 poles at $3 a pole, delivered, amounting to $204, and allowing $2.50 per pole for labor in the erection of the poles, including the cost of cross-arms and pin, $170; 28 miles of iron wire at $18 per mile, $336, and the labor of stringing the wire at $2.50 per mile, $70; making a total of $780.

Q. The claim of the plaintiff here is $138 per year. What per cent. of the cost of the line, the value, is that?

A. That would be about 17 per cent.

(Record, pages 30 and 31.)

The defendant also called Thomas O'Rourke, its lineman at New Hope, employed by it since 1882, who testified as follow:

Q. Since 1882, what have been your duties concerning this line of telegraph in New Hope?

A. To keep up the line as lineman, repairman and test operator.

Q. So that during all that time you have been engaged for the defendant in inspecting and regulating its poles and wires?

A. Yes, sir.

Q. You stated that you had been constantly employed along this line in the borough?

A. Yes, sir.

Q. Do the borough authorities do anything whatever in the way of inspection of this line?

A. No, sir.

(Record, pages 31 and 32.)

The defendant also called David Cunningham, the Secretary of the Council of the Borough of New Hope since October, 1894, who testified as follows:

Q. Since October, 1894, has the Borough of New Hope made any payments or disbursements for inspection or regulating the line of telegraph for (of) the Postal Telegraph Company?

A. No, sir.

The only witness called by the plaintiff, who furnished any evidence whatever as to any work done on behalf of the borough by reason of this telegraph line being built therein, was John Markey, the Assessor, and this was developed in cross-examination. Upon this point he testified as follows:

Q. When did you get this information? when did you count these poles and measure these wires?

A. I have counted those poles since 1894, every year.

Q. You have counted them every year?

A. Yes, sir.

Q. And measured them every year?

A. No, sir. I have measured them this year.

Q. How long have you been Assessor?

A. Eight years.

Q. Did you ever perform any other duty in connection with telegraph poles and wires?

A. What do you mean?

Q. Did you ever do anything else?

A. Yes, I worked.

Q. In connection with the poles and wires of the telegraph company?

A. No, I don't think I did, only in making the borough assessment.

Q. But I am talking about poles and wires of the telegraph company. You never did anything except count them once a year, and this last time measured them?

A. Yes, that is all.

(Record, page 29.)

Under the above facts, which constituted practically all of the testimony in the case, the trial Judge submitted it to the jury for its determination as to whether or not the ordinance was excessive or reasonable.

The plaintiff's claim was to recover the sum of five hundred and fifty-two dollars ($552), with interest thereon. (Record, page 22.)

The verdict of the jury, rendered October 17, 1899, was four hundred and sixty-six dollars and forty cents ($466.40) (Record, page 20), and from the judgment entered thereon this appeal has been taken.

SPECIFICATIONS OF ERROR.

(1) The learned judge who tried the cause erred in refusing the third point submitted by the said defendant, which third point was as follows:

> "Evidence in this case shows that the amount of license fee sought to be imposed upon the defendant is excessive in amount, and the ordinance of the plaintiff is therefore illegal and void, and the verdict must be for the defendant."

The answer of the learned Judge thereto being as follows: "Refused."

(2) The learned Supreme Court erred in affirming the judgment of the Superior Court of Pennsylvania.

(3) The learned Supreme Court erred in not reversing the judgment of the Superior Court of Pennsylvania.

ARGUMENT.

This case was tried in the Court of Common Pleas of Bucks County, immediately before the case of the Borough of New Hope against the Western Union Telegraph Company, which has since been decided by this Court (187

U. S. 419). In rendering its decision in that case, it is respectfully submitted that this Court was entirely guided by the fact that the Appellate Courts of Pennsylvania had, in a long line of cases, held similar amounts of license fees to be reasonable, and that their conclusion was not so manifestly wrong as to justify the interposition of this Court. In that case three of the learned Judges dissented, and shortly thereafter the case of the Atlantic and Pacific Telegraph Company against the city of Philadelphia was argued, and decided June 1, 1903 (190 U. S. 817), and the entire subject reviewed to a very much greater extent, and rules laid down for the purpose of guiding the lower Court as to when the question of reasonableness should be passed upon by it, and when, by reason of a conflict of testimony, the question of reasonableness of the charge should be submitted to a jury.

Inasmuch as the jury in this case rendered a verdict for an amount less than the plaintiff's claim, it showed conclusively that in its opinion the charges imposed were to some extent at least excessive, and this being so, it is respectfully submitted that the verdict cannot stand, because it should have been in the full amount of the claim, or for the defendant. While the Borough Council may, in the exercise of its police powers, have the right to impose a license fee or charge upon telegraph poles and wires, and it is in the first instance presumed to be reasonable, nevertheless a jury has no such power and cannot change the rate.

In charging the jury in this case the lower Court said:

> "The Court confesses that it has a great deal of doubt as a matter of fact and law as to whether it is a reasonable subjection or not. We are frank to say that we are inclined to the view that this is an arbitrary imposition of a license or tax rate. . . . (Record, page 33.)
>
> "Now, then, gentlemen, while the question as to whether an ordinance is reasonable or not is

> for the Court, and the Court does not propose to evade that question, yet I have concluded to obtain the assistance and judgment of this jury as to whether an assessment such as this is, under the circumstances of this case, is reasonable or unreasonable under the law, as I have laid it down, for this surely involves the facts." (Record, page 34.)

It was undoubtedly, therefore, the opinion of the trial Judge that upon the undisputed facts he personally considered that these fees amounted to a tax for revenue, but that he felt bound by the numerous decisions of the Appellate Courts, and therefore submitted the case to the jury instead of determining it himself.

In the case of the Atlantic & Pacific Telegraph Company against the City of Philadelphia, 190 U. S. 817, *supra*, this Court said:

> "It may be conceded that, generally speaking, whether an ordinance be reasonable is a question for the Court."

As said by Judge Dillon, in his work on Municipal Corporations (4th ed. Vol. I, Sec. 327):

> "Whether an ordinance be reasonable and consistent with the law or not *is a question for the Court*, and not the jury, and evidence to the latter on this subject is inadmissible. While that may be correct as a general statement of law, and especially in cases in which the question of reasonableness turns on the character of the regulations prescribed, yet when it turns on the amount of a license charge it may rightly be left for the determination of a jury. . . . The reasonableness of this license charge being tried before a jury, the parties were entitled to a finding of a jury upon that question of fact, unless the testimony was such as to compel a decision one way or the other, in which case the Court might be justified in directing a verdict.

In the case of the City of Philadelphia against the Western Union Telegraph Company, 89 Fed. Rep. 454, Mr. Justice Shiras, upon this particular question, said:

> "When it is said, in some of the cases, that such a question is for the determination of the Court, it is not meant that the question may not properly be sumbitted to a jury. What is meant by such observations is that Courts are not precluded upon considering the reasonableness of the legislative act prescribing the terms and amount of the charges."

While under the facts in the last decided case by this Court, it was held that it should have been submitted to a jury, yet the Court pointed out numerous facts which were to be taken into consideration, which were developed by the testimony offered, by reason of which the reasonableness or not of the charges should be determined by the jury. In the case at hand there was not one single disputed fact.

The effect of a decision in favor of the reasonableness of the charge imposed in this case would be that the amount thereof will, under all circumstances, be considered reasonable. If the charges imposed had been ten times as much as they actually are, it is impossible to conceive how stronger testimony could have been produced, to show that the same were unreasonable, and yet it probably would be conceded that such an amount would be excessive. There was, in other words, nothing to guide the jury, which in any way would allow it to say from the testimony that these charges were proper and not excessive; and therefore the Court itself should have followed its own expressed ideas, and held the ordinance void, because the charges were so unreasonable as to make them amount to a revenue measure. On the contrary, the undisputed testimony not only showed no expense whatever, imposed upon the borough, by reason of this telegraph line being constructed

within its limits ; but, on the contrary, the charges amounted to such an annual per cent. (more than seventeen) upon the entire value of the telegraph line within the borough as to become a rate of charge, which no community in the whole United States would attempt to impose even for revenue purposes, without grave danger of an uprising of the people. The wisdom of the Court assuming such power is shown by the guesswork of this particular jury, in rendering a verdict for a portion of the amount claimed, and thereby undertaking to set itself up as the tribunal which could fix the rate.

If the facts in this case are not sufficient to warrant the Court determining that the amount of the charges imposed are so unreasonable as to make the ordinance void, it is respectfully submitted it will be impossible to avoid making payment of whatever amount the Council of a small borough might see fit to impose.

It appears as a fact, in another case immediately succeeding this in number (Postal Telegraph-Cable Company against Borough of Taylor, United States Supreme Court, October Term, 1903, No. 93), that these charges imposed upon this company would amount to more than one hundred thousand dollars ($100,000) per annum, in the State of Pennsylvania alone, if they are held to be a standard rate, which at all times shall be considered reasonable. If the same charges are imposed by the boroughs and municipalities of all the States, they will amount to millions of dollars per year, and certainly must become a burden upon interstate commerce, and affect the entire people of the United States. There can be but one result to follow, which would be the material raising of the prices charged for telegraphic messages, or the telegraph companies will be forced out of business altogether, in order to avoid becoming insolvent.

The importance of this subject has materially grown within the last few years, during which time ordinances such as the one in this case have continued to be passed by the councils of the boroughs and cities. While the facts in this case may not vary materially from those in the case of the Western Union Telegraph Company against the same borough, *supra*, nevertheless this same point, as to whether or not the Court should have submitted the case to the jury, or have directed a verdict for the defendant, was not argued or discussed in the opinion of the Court. There is, therefore, no necessity existing for this Court to reverse its decree in the other case, should it now hold that the judgment here must be reversed because of the error of the Court below in submitting it to the determination of the jury.

FRANK R. SHATTUCK,
Attorney for Plaintiff in Error.

In the Supreme Court of the United States.

Postal Telegraph-Cable Company, Plaintiff in Error, against *The Borough of New Hope, Defendant in Error.*	October Term, 1903. No. 92.

BRIEF OF DEFENDANT IN ERROR.

The plaintiff in error contends:

1. That the Court below should not have submitted the case to the jury, but should have decided the question of the reasonableness of the ordinance itself; and

2. That the verdict should not be permitted to stand, because it was for a less amount than the plaintiff was entitled to recover, under the evidence, if entitled to recover at all.

In reply the defendant in error respectfully submits:

1. That this case is ruled by the decision of this Court in the case of the Atlantic and Pacific Telegraph Company v. City of Philadelphia (190 U. S., 817), rendered June 1, 1903, in which it was said:

> "It may be conceded that, generally speaking, whether an ordinance be reasonable is a question

> for the Court. As said by Judge Dillon, in his work on Municipal Corporations (4th ed., vol. 1, §. 327): 'Whether an ordinance be reasonable and consistent with the law or not *is a question for the Court*, and not the jury, and evidence to the latter on this subject is inadmissible.' While this may be correct as a general statement of the law, and especially in cases in which the question of reasonableness turns on the character of the regulations prescribed, yet when it turns on the amount of a license charge, it may rightly be left for the determination of a jury. There are many matters which enter into the consideration of such a question, not infrequently matters which are disputed and in respect to which there is contradictory testimony."

It is contended here by the plaintiff in error that the ordinance in question is unreasonable and therefore void, because of the *amount* of the license fees which it imposes, and not because of the *character* of the regulations which it prescribes. This case and that of Western Union Telegraph Company v. Borough of New Hope (187 U. S., 419), decided January 5, 1903, involve a construction of the same ordinance. They were considered together in the Superior Court of Pennsylvania, and this case was decided in a *per curiam* opinion, as follows:

> "This case differs in no essential features from the case of the same borough against the Western Union Telegraph Co., No. 101, October term, 1900, in which we have this day filed an opinion. Judgment affirmed."

(See Transcript of Record, page 17). The Supreme Court of Pennsylvania disposed of the appeal from the Superior Court in a *per curiam* opinion, as follows:

"The judgment in this case is affirmed on the opinion of Judge Rice of the Superior Court."

(See Transcript of Record, page 13).

In both cases the learned trial judge submitted the question of the reasonableness of the license fees prescribed, to the jury, under the evidence, and in doing so, it is submitted, he followed the law as since declared by this Court.

2. That the rendering of a verdict for an amount less than the plaintiff's claim, the evidence being uncontradicted, is not an error of which the plaintiff in error (the defendant below) can be heard to complain.

The rule is well settled that, where a jury gives the plaintiff less than he is entitled to receive upon the finding of the issue in his favor, it is an error of which the plaintiff alone can complain, and if he submits to the verdict, the defendant cannot be heard to insist that it shall be set aside because it is unjust to the plaintiff. Wolf v. Goodhue Fire Ins. Co., 43 Barb., 400; Lamberty v. Roberts, 31 N. Y. S. R., 148. A verdict in an action for damages in favor of the plaintiff will not be set aside at the instance of the defendant because it was for one-half of the amount that the plaintiff claimed was due him, though the evidence as to the amount due was uncontradicted. Alderman v. Cox, 74 Mo., 78. A party against whom a verdict is rendered is not entitled to a new trial upon the ground that the other party ought to have recovered more or nothing. Wright v. Griffey, 44 Ill. App., 115. A new trial will not be granted at the instance of the defendant, when the plaintiff recovered apparently less, rather than more, than the evidence warranted. Smith v. Lee, 82 Ga., 674.

It appears from the record (page 20) that the attorney for plaintiff after the rendition of the verdict paid the verdict fee, whereupon judgment was entered thereon. The

plaintiff thereby accepted the verdict and waived any right, which it may have had, to complain.

3. That there is no Federal question involved in this case as it comes before this Court.

The writ of error was allowed upon the ground set forth on page 2 of the record, to wit, that the appellant was entitled to "a right, title, privilege and immunity * * * claimed under the Constitution of the United States, article one, section eight, clause three, providing amongst other things, that Congress shall have the power to regulate commerce with foreign nations, and among the several States and with the Indian tribes." It appears from the whole record that the Federal question raised by the plaintiff in error was whether the provisions of this ordinance amounted to a regulation of interstate commerce. This was decided in the case of the Western Union Telegraph Company v. Borough of New Hope, *supra*, and the Court will not reconsider it in this case.

> "When a proposition has once been decided by the Supreme Court of the United States, it can no longer be said that in it there still remains a Federal question. More correctly it is said that there is no question State or Federal."
>
> Mr. Justice Brewer in Kansas v. Bradley, 26 Fed. Rep., 289, 290.

It has also been held that when the Federal cause of action fails relief cannot be granted upon another ground. Larrowe-Loisette v. O. Loughlin, 88 Fed. Rep., 896.

It is therefore respectfully submitted that the writ of error should be dismissed for want of jurisdiction.

WILLIAM C. RYAN,
For Defendant in Error.

Supreme Court of the United States.

No. 92.—October Term, 1903.

The Postal Telegraph-Cable Company, Plaintiff in Error, vs. The Borough of New Hope. | In error to the Supreme Court of the State of Pennsylvania.

[January 4, 1904.]

The borough of New Hope in January, 1899, commenced an action against the telegraph company, the plaintiff in error herein, to recover from it the sum of $552, with interest, from the respective times in which portions of the amounts became due, the total charges being due from the defendant, as alleged, on account of a license fee taxed by the borough, (by virtue of an ordinance to that effect,) of one dollar for each pole and of two and a half dollars for each mile of wire used in the borough by the company, the license to be applied for and the fee to be paid annually.

The company made what is termed in the record an affidavit of defense, which, among other things, averred that it was a corporation organized under the laws of the State of New York and had accepted the act of Congress, approved July 24, 1866, (14 Stat. 221, relating to the construction of telegraph lines over any post road of the United States,) and that its poles and wires through the borough of New Hope were employed and operated in the transmission of messages between the different States, and were therefore instruments of commerce; that the amount of the charges claimed to be due from the defendant under the ordinance was unreasonable, unjust and excessive; that the fee was sought to be justified as a license merely, but that the amount thereof was wholly disproportionate to the usual, ordinary and necessary expenses of inspecting and supervising the poles and wires imposed upon the borough of New Hope, and was largely in excess thereof, and the fee was also largely in excess of any additional liability of that kind and character imposed upon the borough in looking after the safety of the poles and wires and to see that they were properly maintained, and was also in excess of any further liability which might or could arise to the borough by reason of any injuries to persons or property which might arise, or may have arisen, by reason of the erection of the poles and the stringing of the wires within the limits of the borough. It was further stated that the charges were more than ten times the amount of all kinds and character of expenses and liability which might have been incurred by the borough by reason of these poles

and wires, and that in view of those circumstances the assessing of the license tax upon the telegraph company was for the purpose of raising and producing revenue, and was therefore void.

The company averred that it had paid the Commonwealth of Pennsylvania all taxes upon the value of its poles and wires, as included in and represented by its capital and upon the gross receipts derived from the use thereof, and it had paid its taxes upon its property in the borough of New Hope. That the expenses incurred by the borough during the period covered by the claim practically amounted to nothing, so far as regarded inspection and supervision.

The parties proceeded to trial, and the borough having proved the passage of the ordinance and the number of poles and the number of miles of wire as claimed in the complaint, thereupon rested.

The defendant proved that the only work done by the employes of the borough in regard to the poles and wires of the company during the four years included in the claim was to count the poles each year for the purpose of assessing the tax; that no other service on the part of the borough was performed under its police powers, or at all, in regard to inspection. The defendant also showed that it was an interstate telegraph company; that it had no public office in the borough, nor had there been any commercial office therein during the time in question; that there was no office in which business was received for which tolls were charged.

It was proved also that the entire value of the line of the company in the borough of New Hope (that is, the cost of the material and construction) amounted to less than $800, and that the claim of the borough, graduated by the number of poles in the borough and the number of miles of wire strung on them, amounted to $138 per year, or to seventeen per centum of the cost of the line in the borough.

The company also proved that it employed servants, whose duty it was to erect the poles and string the wires and inspect and watch them, and keep them in proper repair and in safe condition; that the authorities of the borough did nothing whatever in the way of inspection of the lines.

The trial judge charged the jury, among other things, that the question which arose in the evidence in the case was that of the validity of the ordinance, to be determined by the amount and character of the charges against the company; that the borough had the right to enact such police regulations as might be necessary and reasonable in the government of the town, but in regard to the taxing question it had no right to go beyond the exercise of what was termed its police power; that if the ordinance was unreasonable in amount it was void; that the power to demand the license fee must be exercised as a means of regulation, and cannot be used as a source of revenue, and that when exacted as a police power it must be limited to the necessary and proper expenses of issuing the license and of

inspecting and regulating the business the license covers; that the borough had the right to impose such conditions and regulations as are necessary for the general protection of the streets and the uses of the same in the borough; that in doing this the borough could not be questioned, provided the license fee was a reasonable and just one and a proper one under the circumstances and commensurate with the probable requirements and exercise of the police or supervisory power of the borough. The court then said that it had a great deal of doubt as matter of fact and law as to whether this was a reasonable subjection or not, and it was frank to say:

"That we are inclined to the view that this is an arbitrary imposition of a license or tax rate. But it appears that our brethren upon the bench in other localities have adjudged that similar rates are not unreasonable or unnecessary; but it is argued upon the part of the defense that in those cases there was not the same proof as has been developed here. There was not shown as clearly as there is here that the amount of money received as the result of the license was a clear revenue, irrespective of any requirement for police regulation. In other words, that this borough seems to have imposed a license fee to be expended and used in the exercise of a power and a duty which it has failed to exercise at all. Now then, gentlemen, while the question as to whether an ordinance is reasonable or not is for the court, and the court does not propose to evade that question, yet I have concluded to obtain the assistance and judgment of this jury as to whether an assessment, such as this is, under the circumstances of this case, is reasonable or unreasonable under the law, as I have laid it down, for this surely involves the facts. Now if you believe that it is unreasonable according to the facts you will render a verdict for the defendant; if you believe that it is reasonable and should be paid in the full amount you will render a verdict for the plaintiff for the amount of its claim, and the court hereafter will regulate judgment in accordance with such views, either upon a motion for a new trial or otherwise, as we shall entertain after having this opinion from you, in aid of its judgment, and to determine the doubt on the facts."

The court further stated:

"The borough of New Hope had no right to impose any charge for the privilege of erecting and maintaining said poles and wires in said borough except only such sum as will reasonably cover and reimburse to it the expense to it which it may be subjected in consequence of the erection and maintenance of said poles and wires, and if the license fees sued for in this case exceed said sum, your verdict shall be for the defendant."

Instead of finding a verdict for the amount due under the ordinance, or else a verdict for the defendant, as directed by the court, the jury on October 17, 1899, found a verdict for $466.40. The trial judge directed judgment to be entered for the borough for the amount of the verdict. From that judgment an appeal was taken by the company to the Superior Court of Pennsylvania, which affirmed the same, that court holding that, the facts being undisputed, the question of the validity of the ordinance was for the court to decide, and that if on the undisputed facts the court

would not have been warranted in declaring the ordinance void, the submission of the question of its reasonableness to the jury was an error of which the defendant had no just right to complain, and the court held that it would not have been justified by the precedents in declaring the ordinance void.

The Supreme Court affirmed the judgment of the Superior Court, and upon the question that the verdict of the jury was for a less sum than the ordinance called for, said that was a matter of which, under the view of the law taken by the court, (that the question of reasonableness was for it,) the plaintiff might complain, but that it was such good luck for the defendant that it might well rest satisfied. The company thereupon sued out this writ of error.

Mr. Justice PECKHAM, after making the foregoing statement of facts, delivered the opinion of the Court.

The ground upon which an ordinance of this nature may be upheld is stated in the two cases of *Telegraph Company* v. *New Hope*, (187 U. S. 419,) and *Telegraph &c. Company* v. *Philadelphia*, (190 Id. 160.)

The trial court held that the question whether the ordinance in this case was reasonable or not was one for the court, but he submitted it to the jury for their aid and as advisory only, the court stating to the jury that it would thereafter regulate the judgment to be entered in accordance with such views as the court might entertain as to the reasonableness of the ordinance, and after having the benefit of the assistance of the jury upon that question.

The direction to the jury was to give a verdict for the full sum, if they thought that the ordnance was reasonable, and if not—that is, if the jury thought that the ordinance was not reasonable—then the verdict should be for the defendant. The jury did not obey that direction. It returned a verdict for a considerably less sum than was due if the ordinance were valid, and by such verdict (regard being had to the charge of the judge) it necessarily found the license fee provided for in the ordinance was unreasonable and the ordinance itself invalid. The verdict is, therefore, simply evidence of what the jury conceived to be a reasonable sum, which it thereupon proceeded to assess by its verdict, and being much less than the ordinance called for. It made itself a taxing body, the verdict being the result of its own views as to what the fees should have been. When the verdict was rendered and the court directed judgment to be entered thereon it must have thereby concurred with the jury and held the ordinance unreasonable and therefore void. Otherwise, if the ordinance was valid, the court would have directed judgment for the full sum without reference to the verdict. Finding, therefore, that the ordinance was void, instead of directing judgment for the defendant, the court followed the jury and

directed judgment for the sum which the court regarded as reasonable, being the same sum found by the jury. This follows because the court had theretofore stated that in its view this ordinance was an arbitrary imposition of a license tax, and the court also announced that the verdict of the jury was not conclusive and would be acted upon by him in accordance with such views as he might entertain after the verdict was rendered. But neither the court nor the jury had any power whatever to give judgment for what either might regard a reasonable sum, if that sum were less than the amount provided for in the ordinance. The source of jurisdiction to give any verdict or judgment for the plaintiff was the ordinance. If the amount of the license fee provided for therein was unreasonable, the ordinance was void, and there was no power in either jury or court to substitute its own judgment as to what was reasonable and to give a verdict or direct a judgment to be entered for that sum. Finding the sum named in the ordinance unreasonable, the verdict or judgment should have been for the defendant.

The argument that plaintiff alone can complain that the verdict is too small is not well founded in this instance. It is undoubtedly the general rule that a verdict or judgment for a less sum for the plaintiff than he is entitled to under the evidence is matter of complaint for him alone, and if acquiesced in by him the defendant has no cause to complain that he is charged for a less sum than he ought to have been. On grounds already stated the reasons do not apply in a case like this.

Both the Superior and the Supreme Courts of Pennsylvania proceeded in their decisions upon the theory that the question was for the court, and that the ordinance was valid; but as the jury had found a less sum than provided for by the ordinance, the judgment might stand, and the defendant could not in such event complain that the judgment was too small. Those courts in effect reverse the finding of the jury that the ordinance was unreasonable and void, while at the same time maintaining a judgment based upon such finding.

In *Western Union Telegraph Company* v. *Borough of New Hope*, (187 U. S. 419,) the question of the reasonableness of the license fee exacted was left to the jury, and the jury found a verdict in favor of the plaintiff, and judgment was rendered thereon, which was affirmed by the State courts upon appeal. Upon writ of error from this court the case was reviewed here, and it was held that, as the jury and the Court of Common Pleas, the Superior Court and the Supreme Court of Pennsylvania, had all held the ordinance reasonable, this court would not say it was so manifestly wrong as to justify our interposition.

There is a difference, however, between such a case and one like this, where the jury and the trial court have, in effect, held the ordinance void, and a judgment has been entered which is unauthorized in any event, and which should have been for the defendant. Where it is a question of

amount in an ordinance in a case like this, we have held that it is not improper to submit that question to a jury, although in general the reasonableness of an ordinance is matter of law for the court. (*Telegraph &c. Co.* v. *Philadelphia*, 190 U. S. 160.)

In the case cited it was stated by Mr. Justice Brewer, speaking for the court, at page 166, as follows:

"It may be conceded that, generally speaking, whether an ordinance be reasonable, is a question for the court. As said by Judge Dillon, in his work on Municipal Corporations, 4th ed. vol. 1, sec. 327: 'Whether an ordinance be reasonable and consistent with the law or not *is a question for the court*, and not the jury, and evidence to the latter on this subject is inadmissible.' While that may be correct as a general statement of the law, and especially in cases in which the question of reasonableness turns on the character of the regulations prescribed, yet when it turns on the amount of a license charge it may rightly be left for the determination of a jury. There are many matters which enter into the consideration of such a question, not infrequently matters which are disputed, and in respect to which there is contradictory testimony."

We think that in this case, like that just cited, it was not improper to submit the question to the jury, and that the verdict necessarily found the license fee exacted by the ordinance unreasonable, and the ordinance itself was therefore void. The jury could not itself assess a tax and render verdict for the amount it might judge reasonable. A judgment entered upon such a verdict for the amount thereof was improper and illegal, as it should have been for the defendant, the ordinance being void.

The judgment of the Supreme Court of Pennsylvania should be reversed and the case remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

Mr. Justice HARLAN and Mr. Justice BREWER dissented.

True copy.

Test:

Clerk Supreme Court, U. S.

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